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IN THE

Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, AND CHRISTOPHER SMITH,

Appellants,

v.

CANDICE S. MILLER, CHRISTOPHER M. THOMAS, THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, AND JAMES L. PALASKE,

Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the District Court erred in effectively concluding that members of a major political party may never state a claim of unconstitutional partisan gerrymandering, thereby nullifying this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986).

2. Whether a State presumptively violates the Equal Protection Clause when it subordinates all traditional, neutral districting criteria to the overarching goal of drawing a congressional redistricting map that achieves maximum partisan advantage for members of one political party.

3. Whether a State exceeds its power under the Elections Clause, Article I, Section 4 of the Constitution, when it draws congressional district boundaries that ensure that candidates belonging to one political party will receive a supermajority of the State's congressional seats even if that party wins substantially less than a majority of the statewide vote.

PARTIES TO THE PROCEEDING

Appellants are Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith. Appellees are Candice S. Miller, Secretary of State for the State of Michigan; Christopher M. Thomas, Director of Elections for the State of Michigan; the Michigan Republican Party; Patrick Miller; Andrew Pettress; and James L. Palaske.

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IN THE

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Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court's opinion and order dismissing Appellants' Article I claim with prejudice and their Equal Protection Clause claim without prejudice is reprinted at J.S. App. 1a-19a. The District Court's order *sua sponte* dismissing the latter claim with prejudice is reprinted at J.S. App. 20a-22a. Neither order has been published.

JURISDICTION

The three-judge District Court's final order dismissing Appellants' claims for injunctive relief from an alleged partisan gerrymander was entered on June 5, 2002. Pursuant to 28 U.S.C. § 2101(b), the notice of appeal was timely filed

within 60 days, on August 2, 2002. J.S. App. 23a-25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 2 of Article I of the Constitution provides in part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." The Elections Clause of Article I, Section 4 of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

STATEMENT OF THE CASE

Appellants, who are Democratic voters from Michigan, appeal the dismissal by a three-judge Federal District Court of their claims that Michigan's newly enacted congressional redistricting plan is so biased in favor of Republicans that it constitutes an unconstitutional "partisan gerrymander." The ruling below is one of a series of lower-court decisions since *Davis v. Bandemer*, 478 U.S. 109 (1986), holding that it is not enough for plaintiffs to show that a districting map severely "packs" and "fractures" voters of one political party and thus disproportionately favors candidates of another party. Although far from consistent with one another, these decisions have all required plaintiffs to prove some harm in addition to the harm caused by a severely biased redistricting map – for example, proof that members of the disfavored political party are being barred from organizing and campaigning for candidates, or a showing that the candidates of the party favored by the map, when elected, would

completely ignore constituents aligned with the disfavored party. Such an approach means that partisan gerrymandering, while justiciable in theory, is immune from legal challenge in actual practice, no matter how extreme the bias that is introduced into a districting scheme. Recognizing that reality, lawmakers have "pushed the envelope" of partisan bias in the post-2000 round of redistricting, with Michigan's map being just one of the most extreme. It is essential that this Court undertake plenary review in this case to make clear that the harms caused by partisan gerrymandering are not wholly beyond judicial redress.

In a mirror image of the pattern long prevalent throughout much of the South, Michigan voters today lean somewhat Democratic in federal elections and slightly Republican in state elections. J.S. App. 43a-44a. When the results of the 2000 census were released in 2001, Republicans narrowly controlled both chambers of the Michigan Legislature as well as the governorship, while Democrats held both U.S. Senate seats and nine of the State's sixteen congressional seats. *Id.* 3a, 16a. Over the last decade, while control of the Legislature oscillated between the two parties, Democrats prevailed in every presidential and senatorial election in Michigan – and in three of those six contests, the Republicans failed to garner even 40% of the statewide vote. *Id.* 43a.[1]

In the summer of 2001, Republicans sought to convert their momentary advantage at the state level into a decade-long windfall at the congressional level. They passed a new congressional redistricting plan on almost perfect party-line

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[1] Michigan Democrats have won 8 of the last 9 U.S. Senate elections and a majority of votes cast statewide in 13 of the last 14 U.S. House elections. *See* Clerk of the House of Representatives, *Statistics of the Congressional Elections* (biennial reports for 1974 to 2000), *available at* http://clerk.house.gov/members/election_information/elections.php.

votes, with only one Republican (and no Democrats) defecting. *Id.* 29a-30a, 32a, 38a-39a, 48a. The 2001 Plan "paired" six Democratic Representatives into three districts, forcing them to retire from Congress or square off in Democratic primary fights; but it gave each of the seven Republican incumbents his own safe seat. *Id.* 45a-46a. Although the State was losing a congressional district due to relatively slow population growth in the 1990s, the 2001 Plan created two "open" (*i.e.*, incumbent-less) districts designed to elect specific Republican candidates (one of whom is the State's chief elections officer and an Appellee in this case). *Id.* 30a, 45a-46a.

Statistical analyses of past election results confirm that 14 of the 15 districts in the 2001 Plan will be effectively noncompetitive in November 2002 and likely for the next decade – with nine districts almost certain to go Republican and five almost certain to go Democratic. *Id.* 27a, 44a-47a. Because the Plan's one competitive district also tilts Republican (absent any incumbency effects), the new districting scheme ultimately will produce a 10-to-5 Republican advantage even if Democrats continue to capture a majority of the congressional ballots cast statewide. *Id.* 3a, 27a, 46a-47a. In Michigan's most recent presidential and senatorial elections, Democratic candidates Al Gore and Debbie Stabenow both prevailed, yet each carried only 5 of 15 districts under the 2001 Plan. *Id.* 44a-45a. That pattern – with competitive Democratic candidates typically winning only 5 of 15 districts – was verified by an expert analysis of the 27 most recent statewide elections. *Id.* 46a. As the court below put it, "[d]espite the increasing majority of Democratic voters in Michigan, Republicans are likely to win ten of Michigan's fifteen congressional seats under the challenged plan." *Id.* 3a.

Furthermore, the 2001 Plan sacrificed compliance with state law for raw partisanship, as it violates the exacting requirements set forth in the Congressional Redistricting Act of 1999, Mich. Comp. Laws § 3.63(c), *reprinted at* J.S. App. 74a-76a; *see id.* 30a-34a. The Legislature had enacted the 1999 law at a time when it was unclear whether one party would control the 2001 redistricting process. J.S. App. 31a. To constrain partisan manipulation, the 1999 Act codified a strict hierarchy of specific neutral districting criteria, giving particularly high priority to minimizing the number of county and municipal boundaries broken by congressional district lines. *Id.* 74a-76a; *see id.* 31a; *see also Good v. Austin*, 800 F. Supp. 557, 560-67 (E.D. & W.D. Mich. 1992) (three-judge court) (describing the traditional criteria that the 1999 Act codified).

In the summer of 2001, Democrats in the Legislature introduced an alternative redistricting plan that broke fewer county and municipal boundaries than did the Republicans' 2001 Plan and that lacked the partisan bias and noncompetitiveness that marred the 2001 Plan. J.S. App. 31a-32a, 47a-49a. Nonetheless, the Legislature, on party-line votes, rejected the alternative map and instead enacted the 2001 Plan – while expressly reaffirming, but reinterpreting, the 1999 Act's neutral criteria. Mich. Comp. Laws § 3.54, *reprinted at* J.S. App. 77a-79a; *see also* J.S. App. 32a-33a. Democrats then unsuccessfully introduced a second alternative plan that better satisfied the governing criteria, even as reinterpreted. *Id.* 41a-42a, 48a-49a.

Three voters (none of whom is a party here) filed suit in the Michigan Supreme Court alleging that the 2001 Plan violated the 1999 Act by needlessly splitting their counties and municipalities. *Id.* 42a. At oral argument, Appellees conceded that the Democrats' second alternative plan broke fewer county and municipal boundaries than did the

Republicans' 2001 Plan. *Id.* 87a; *see id.* 41a-42a. But the court held that the criteria enacted in 1999 and reenacted in 2001 were unenforceable. *LeRoux v. Secretary of State*, 640 N.W.2d 849, 860-64 (Mich. 2002).

In addition to its substantive problems, the 2001 Plan's enactment was, in the District Court's words, marked "by a host of procedural defects." J.S. App. 4a; *see id.* 14a, 34a-43a. Seizing advantage of their narrow, but disciplined, majorities, the Republican leaders of the Michigan Senate and House of Representatives rammed the 167-page bill containing the 2001 Plan through both chambers in a matter of days. *Id.* 35a-39a; *see id.* 38a-39a (describing how the House committee's sole hearing ended at 11:00 p.m. and the House passed the bill that night at 2:35 a.m.).

The rushed process successfully squelched public (and bipartisan) deliberation and led to two serious substantive errors. *Id.* 34a-43a. Specifically, one district turned out to be noncontiguous (a defect cured by amendment the next day, immediately before the Legislature adjourned for the summer); and the plan as a whole violated the principle of "one person, one vote," as 4,578 Michiganders were not assigned to *any* of the State's 15 congressional districts. *Id.* 39a-40a. By the time the second error was discovered, the Legislature was on summer recess and sending the bill back for amendment in the fall would have opened it to precisely the kind of public scrutiny that the rushed process was designed to avoid. *Id.* 39a-41a. After several embarrassing news reports and a handful of meetings with the Republican leadership, the Secretary of the Senate opted to "fix" the mistake unilaterally. *Id.* 40a. She sent the revised bill to the Governor, and he signed it at 4:54 p.m. on September 11, *id.* 40a-41a – apparently seeking to minimize further adverse news coverage.

The Justices of the Michigan Supreme Court – divided along partisan lines – upheld the validity of the enactment even though the bill passed by the Legislature on July 11 differed from the bill signed by the Governor on September 11. *LeRoux*, 640 N.W.2d at 856-60 (interpreting MICH. CONST. OF 1963 art. 4, §§ 1, 26, 33); *see id.* at 864-69 (Kelly, J., dissenting).

While the *LeRoux* plaintiffs' state-law challenges to the 2001 Plan were pending in the Michigan Supreme Court, the Federal District Court deferred consideration of Appellants' federal-law claims, which primarily alleged that the 2001 Plan was a partisan gerrymander that would frustrate the will of the majority for the next 10 years, in violation of the Equal Protection Clause and of Article I, Sections 2 and 4. J.S. App. 53a, 70a-73a. In the federal action, Appellees conceded that the Michigan Legislature had acted with unconstitutionally discriminatory *intent*, but asserted that Appellants' complaint should be dismissed because Appellants had failed to allege sufficiently severe *effects*. *Id.* 6a.

The federal court held a hearing, postponed the deadline for congressional candidates to file nominating petitions, and established an expedited schedule for discovery and briefing, leading to a three-day trial on May 21 to 23. On May 15, the court issued an order reaffirming its modification of the election calendar and stating that the Appellants had demonstrated "a likelihood of success on the merits of their claim, or a portion thereof, of unconstitutional political gerrymandering." *Id.* 82a. But that same day, the court issued an order canceling the trial. *Id.* 84a-85a.

On May 24, the District Court dismissed Appellants' first amended complaint, but authorized them to refile a complaint limited to their equal-protection claim, if they could satisfy requirements the court spelled out. *Id.* 2a. Following the court's guidance, Appellants promptly

clarified the basis for their equal-protection claim in a second amended complaint, *id.* 26a-51a, which the District Court then dismissed with prejudice *sua sponte* on June 5, 2002. *Id.* 20a-22a.

In analyzing Appellants' equal-protection claim, the District Court explained that *Bandemer* established three elements for a cognizable claim of partisan gerrymandering: plaintiffs "must prove '[1] intentional discrimination [2] against an identifiable political group and [3] an actual discriminatory effect on that group.'" J.S. App. 5a (quoting *Bandemer*, 478 U.S. at 127 (plurality opinion)). The District Court acknowledged that Appellants' complaint "easily satisfied" the first two elements and, as to the third element, "alleged disproportionality in abundance." *Id.* 6a, 14a. But the District Court held that the complaint failed to satisfy the third element – "an actual discriminatory effect" sufficient to violate the Equal Protection Clause – because in addition to evidence of "abundan[t]" disproportionality between votes and seats, Appellants needed to allege at least one of three "'other indicia'" of political powerlessness. *Id.* 7a, 14a (quoting *Bandemer*, 478 U.S. at 143 n.21 (plurality opinion)). The three "other indicia" were:

(1) that the 2001 Plan would result in Democrats being essentially "shut out" of, and completely excluded from, the political process. *Id.* 9a-10a, 13a. As examples of such "complete exclusion," the court cited proof that African-Americans in certain locales in the 1960s and early 1970s were "'not allowed to register or vote [or] choose the political party they desired to support . . . [or] be included among the candidates slated by the Democratic Party.'" *Id.* 12a (citation omitted); *see also id.* 10a n.4 (describing partisan interference with "'registration, organizing, voting, fund-raising, or campaigning'") (citation omitted). The court did not explain how a congressional redistricting plan could

deprive one party's voters of their rights to register or organize or cast ballots or raise campaign funds.

(2) that Republican Members of Congress elected under the 2001 Plan would be "indifferent" to the interests of Democratic citizens. *Id.* 10a-13a. Appellants' second amended complaint alleged that Republican Representatives elected from strongly Republican districts will be "indifferent to the dissenting views" and will likely "ignore the interests" of their Democratic constituents. *Id.* 27a (¶ 1), 47a (¶ 56). The complaint further alleged that the noncompetitive nature of 9 of the 10 Republican-leaning districts would encourage their Representatives to ignore Democratic voters' views and to be generally less responsive in providing constituent services. *Id.* 47a (¶ 57). The court nonetheless rejected Appellants' claim because they had failed to allege that "their interests will in fact be '*entirely* ignore[d]' by their representatives." *Id.* 22a (quoting *id.* 11a) (emphasis added; brackets in original). In so holding, the court latched on to two "admissions" in the second amended complaint: first, that Republican Representatives would likely respond to some "'requests for assistance'" from Democratic constituents; and second, that Republican Representatives would likely "'listen'" to the views expressed by some Democratic constituents. *Id.* 22a (quoting *id.* 47a (¶ 57)). Thus, Republican Representatives would neither be *wholly* indifferent to, nor *entirely* ignore, the interests of their Democratic constituents. *Id.* 9a-13a, 22a.

(3) that Democrats "have no chance of obtaining more favorable congressional districts in the next reapportionment," which presumably will occur in 2011. *Id.* 13a; *see also id.* 8a (asking whether a party "had 'no hope' of improving its fate in the next reapportionment") (citation omitted). The *possibility* that by 2011 Democrats might

control a chamber of the Michigan Legislature, *id.* 21a; *cf. id.* 46a-47a, or the governorship, *id.* 8a-9a, suggested to the court that a "political solution" is "within reach by the next decade" and therefore the discriminatory effects of the 2001 Plan lacked the "substantial permanency" necessary to violate the Equal Protection Clause. *Id.* 8a, 21a.

The District Court's rejection of Appellants' Article I claim was even more sweeping. Although the Elections Clause of Article I, Section 4 expressly delegates to "each State . . . Legislature" the power to prescribe the "Places and Manner of holding Elections for . . . [United States] Representatives," U.S. CONST. art. I, § 4, cl. 1, the District Court held that the Michigan Legislature's power to divide the State into congressional districts "does not stem from Section 4" and thus Section 4 "has no role to play." J.S. App. 15a. The court also held that Section 2 of Article I had no bearing on partisan gerrymandering. *Id.* 15a n.6. Therefore, the District Court reasoned, the gerrymandering of a State's congressional districting plan – no matter how severe, permanent, and detrimental to effective majority rule – can never violate Article I of the Constitution. *See id.* 15a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court held in *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986), that partisan gerrymandering claims are justiciable. That decision was a watershed. Prior to *Bandemer*, the only judicially enforced constitutional limit on political discrimination in redistricting was the "one person, one vote" mandate. But as Justice Harlan observed in 1969, the rule "of absolute [population] equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." *Kirkpatrick v. Preisler*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); *see also Karcher v. Daggett*,

462 U.S. 725, 776 (1983) (White, J., dissenting) ("There is now evidence that Justice Harlan was correct to predict that '[e]ven more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.'") (citation omitted). By recognizing a limit to political discrimination in redistricting other than the rule of population equality, *Bandemer* promised to check partisan gerrymandering, which Justice White deemed "a far greater potential threat to equality of representation." *Karcher*, 462 U.S. at 776 (citation and internal quotation marks omitted).

That promise, as the District Court's decision demonstrates, has yet to be realized. It is difficult to imagine a more egregious partisan gerrymander than the 2001 Plan, a map that jettisons the neutral districting criteria twice enacted by the Michigan Legislature, so that one political party can win two-thirds of the State's congressional seats even if it receives less than half of the popular vote. The degree of partisan skew in this case goes far beyond that of the map challenged in *Bandemer* itself. But despite this Court's clear indication in *Bandemer* that state legislatures may not consign political majorities to minority status, and despite Appellants' very specific allegations that the 2001 Plan would accomplish that goal, the District Court held that Appellants had failed to state a valid claim.

The District Court enunciated a test for unconstitutional partisan gerrymandering that clearly conflicts with *Bandemer*. Application of that test renders it impossible for voters affiliated with a major political party to state a political-gerrymandering claim, because it requires them to plead and then prove *not only* severe bias in a districting map *but also* at least one of three "other indicia" of political powerlessness, none of which in practice can ever be proved.

But there has never been a clearer need for some enforceable limit on the ability of legislators to dilute the voting power of a class of citizens based on their political viewpoint. In the sixteen years since this Court decided *Bandemer*, advances in political data-gathering and computer technology have made it increasingly easy for legislatures to gerrymander with surgical precision, excising and shifting just a few politically undesirable voters at a time. As a result, in the current round of redistricting, legislators in a number of key States, including Michigan, Pennsylvania, and Florida, have drawn congressional district maps with remarkable levels of partisan bias.[2] In so doing, they have simultaneously undermined any assumption that partisan gerrymandering is a "self-limiting enterprise" because efforts to maximize partisan advantage will cut the margins too thin, weakening a party's safe seats and exposing its own incumbents to greater risks of defeat. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring in the judgment). In Michigan, Appellants' expert statistical analysis indicated that none of the 9 heavily Republican districts in the 2001 Plan had even a one-out-of-ten chance of going Democratic in the November 2002 elections. And nationally, the post-2000 round of redistricting has produced the fewest competitive seats in more than 200 years of congressional history.[3] Today, partisan gerrymandering is no longer a self-

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[2] An appeal from the dismissal of partisan-gerrymandering claims in the Pennsylvania case has been docketed as *Vieth v. Jubelirer*, No. 01-1873.

[3] *See, e.g.*, Editorial, *Democracy Denied*, RICHMOND TIMES-DISPATCH, Mar. 17, 2002, at E2 ("Precision redistricting – *i.e.*, gerrymandering – has made 380 districts safe for one party or the other. Citizens will cast ballots in November, but their votes effectively were counted when the pols drew the lines."); Juliet Eilperin, *House Democrats' Climb Gets Steeper: Party Lacks Rallying Cry as Redistricting, Incumbency Cut Competitive Races*, WASH. POST, Apr. 2, 2002, at A1 ("A decade ago, there were roughly 100 competitive races following redistricting; this year there will be 30 to 40, perhaps even fewer . . . ."); *see also* Alison

limiting enterprise, and enforcement of *Bandemer* is more important than ever.

The Court should take this opportunity to clarify that extreme partisan gerrymandering is not only justiciable in theory but remediable in actual practice. Recent decisions by this Court help clarify the appropriate standard for identifying an unconstitutional partisan gerrymander. *First*, this Court has held that a districting plan is presumptively unconstitutional if the mapmakers allowed racial considerations to predominate over all neutral districting principles. *See Shaw v. Reno*, 509 U.S. 630 (1993) (overreliance on racial considerations in redistricting presumptively violates the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900 (1995) (same). Following the logic of these decisions, it is presumptively unconstitutional under the Equal Protection Clause for a State to subordinate all neutral districting principles to the predominant aim of maximizing partisan advantage.

Second, the Court has made clear that, in the context of *congressional* – as opposed to state-legislative – redistricting, Article I of the U.S. Constitution imposes more stringent limits on the power of the state legislatures to manipulate electoral outcomes. States may not use their power to regulate federal election procedure to dictate electoral outcomes, to advantage one class of candidates over another, or to frustrate the will of the majority of voters. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). The same principles require stringent limits on the power of legislatures to

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Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 13, 2002, at A20 ("With Congressional redistricting almost complete, the once-a-decade redrawing of the nation's political map is turning out to favor incumbents to an unusual degree, making many of the House's swing seats into safer territory for one party or the other.").

predetermine the results of congressional voting through strategic line-drawing.

The errors committed below in this case, and in other cases like it, demonstrate a pressing need for this Court to clarify and enforce the constitutional norm it first announced in *Bandemer* – a norm necessary to ensure fairness and competition in congressional elections.

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF *BANDEMER*.

The controlling plurality opinion in *Davis v. Bandemer* established that a plaintiff who alleges "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" states a claim of unconstitutional political gerrymandering. 478 U.S. at 127. While *Bandemer* recognized that there is no guarantee of proportional representation in our winner-take-all political system, it also recognized that there is a difference between a redistricting plan that results in moderately disproportionate representation and a plan designed to ensure that a party that wins a *majority* of the vote statewide will win far less than a majority of the seats for an entire decade. Thus, *Bandemer* emphasized three factors in assessing whether discriminatory effects are unconstitutional: (1) the likely severity of the partisan skew; (2) the likely duration of the skew; and (3) whether that skew is sufficient to prevent a majority of the voters from exercising control. *See id.* at 133 (plurality opinion). The Court explained that, to make out a claim of partisan gerrymandering, a plaintiff must show that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and that this showing can be "supported by evidence of continued frustration of the will of a majority of the voters." *Id.* In other words, redistricting should achieve "a level of parity between votes and representation sufficient

to ensure that significant minority voices are heard and that majorities are not consigned to minority status," in keeping with "our general majoritarian ethic and the objective of fair and adequate representation." *Id.* at 126 n.9 (majority opinion) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

A. Appellants Stated a Valid Claim Under *Bandemer*.

Appellants' allegations in this case were sufficient to establish the 2001 Plan's unconstitutionally discriminatory effects. Appellants alleged that the 2001 Plan will generate extremely disproportionate results: although a majority of Michigan voters have favored Democratic candidates in recent federal elections, the 2001 Plan is likely to produce a congressional delegation that consists of ten Republicans and only five Democrats. J.S. App. 3a, 44a-47a. Appellants further alleged that this partisan skew would be locked in for at least a decade, that 9 of the 15 districts would remain safely out of reach even if Democrats increased their statewide victory margins by 10 percentage points, and that this unprecedented degree of bias and noncompetitiveness was achieved by violating the neutral criteria codified in the 1999 Congressional Redistricting Act. *Id.* 30a-34a, 46a. To be sure, establishing the discriminatory effects of a partisan gerrymander requires a showing of "more than a *de minimis* effect" on the plaintiffs, since "[d]istrict-based elections hardly ever produce a perfect fit between votes and representation," and "[i]nviting attack on minor departures from a supposed norm would too much embroil the judiciary in second-guessing" state legislatures. *Bandemer*, 478 U.S. at 133-34 (plurality opinion). But here, the predictable effect of the 2001 Plan's discrimination against Democratic voters could not possibly be considered a "minor departure" from any reasonable norm.

The level of partisan skew in this case contrasts dramatically with the facts present in *Bandemer*, where the evidence had indicated that Democrats in the 1982 elections won 51.9% of the major-party vote and 43% of the seats in the House, and won 53.1% of the vote and 52% of the seats in the Senate. *See* 478 U.S. at 115, 134, 137 n.16 (plurality opinion). Moreover, in *Bandemer*, "the District Court [had] declined to hold that the 1982 election results were the predictable consequences of the 1981 Act" or "that those results were a reliable prediction of future ones." *Id.* at 135.

Here, despite the fact that Democrats, by any measure, constitute at least half of Michigan voters in congressional elections, the predictable result of the 2001 Plan is that Republicans will win twice as many seats as the Democrats in Michigan's congressional delegation, J.S. App. 3a, and will hold that advantage for the remainder of the decade, *id.* 44a-47a. That bias was far from inevitable: the Democratic legislators' alternative plans would have generated rough proportionality between each party's vote share and its seat share, while respecting county and municipal boundaries, as Michigan law requires. *Id.* 31a-32a, 47a-49a. The 2001 Plan therefore violates the Equal Protection Clause by needlessly consigning a political majority to minority status. *See Bandemer*, 478 U.S. at 133, 135 (plurality opinion).

B. The District Court Adopted a Construction of *Bandemer* That Would Effectively Overrule It.

The District Court's test effectively bars members of either major political party from stating a claim of unconstitutional partisan gerrymandering and thus conflicts with this Court's holding in *Bandemer*. The court below held that plaintiffs not only must allege that a redistricting plan intentionally discriminates against an identifiable political group and that it will generate severe and persistent disproportionality between that group's share of votes and its

share of seats. Under the District Court's test, plaintiffs also must allege at least one of three "other indicia" of political powerlessness: (1) that members of their political party will be *completely* excluded from the political process; (2) that the candidates favored by the map, when elected, will *entirely* ignore constituents aligned with the disfavored party, refusing even to listen to their views or to help them with constituent casework; or (3) that the disfavored party has *no chance* of obtaining a more favorable districting plan ten years hence, after the next reapportionment. J.S. App. 6a-14a. Because in reality no member of a major political party could ever establish any of these three indicia of powerlessness, the decision below effectively overrules *Bandemer* and insulates all congressional districting plans from scrutiny under the Equal Protection Clause.

The first of the three indicia – being "completely excluded" or "shut out" from the political process – is based on a misreading of the *Bandemer* plurality opinion. That opinion cited this Court's earlier cases invalidating redistricting plans that intentionally diluted the voting strength of *racial* minorities: "In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process." *Bandemer*, 478 U.S. at 139 (plurality opinion). The minority plaintiffs in those cases had proved disproportional under-representation "in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* The *Bandemer* plurality never suggested that plaintiffs bringing *partisan*-gerrymandering claims had to meet the *identical* standard, because that would be tantamount to making those claims nonjusticiable. History shows that a racial minority group comprising 10 or 20 percent of a jurisdiction's population can be essentially "shut out" of the political process when its members are deprived their rights to register or vote or raise funds or organize campaigns. But

there are no instances of a major political party (typically with the support of somewhere between 40 and 60 percent of the electorate) being so completely excluded from the political process. This is a test that will never be met.

The same is true of the second of the District Court's indicia of political powerlessness – the requirement that elected representatives "entirely" ignore the interests of citizens who voted against them. Appellants' second amended complaint alleged that Republican Representatives from safely Republican districts not only would ignore the interests of Democratic citizens, but would use their power on the floor of the House and in its committees and subcommittees to actively oppose policies promoted by Democratic officeholders, candidates, and voters. *See* J.S. App. 47a. Absent any serious electoral competition, these Representatives would lack the incentive to appease Democratic-leaning voters. Indeed, political scientists have long recognized that lopsided, noncompetitive districts spawn Representatives who tend to be averse to centrism and compromise. But there is simply no evidence to indicate that partisan Members of Congress refuse even to "listen" to constituents' opposing viewpoints, nor do they typically apply a partisan litmus test before assisting constituents with casework, such as helping senior citizens get their checks from the Social Security or Veterans' Administration. That kind of discrimination would be political suicide. The District Court nevertheless held that, so long as Republican Representatives "listen" to Democratic constituents and help them occasionally to navigate the federal bureaucracy, Democrats' interests will not be "entirely" ignored and therefore they cannot state a cognizable claim of partisan gerrymandering. *Id.* 22a. This, too, is a test that can never be met.

Finally, future plaintiffs will fare no better in alleging the District Court's third indicia of political powerlessness – the impossibility of getting a more favorable map after the next round of redistricting. The District Court stated that the mere possibility that Michigan might elect a Democratic Governor or a Democratic State Senate within the next decade rendered it impossible for a Democratic plaintiff to satisfy this requirement. *Id.* 8a-9a, 21a. But, as already explained, *Bandemer* itself focused on claims alleging that a political *majority* had been consigned to minority status – and, by definition, members of a political *majority* always have at least some realistic potential to elect their preferred candidate for Governor (or for any other statewide office not subject to gerrymandering). Thus, any group that is weak enough to satisfy this third indicia of powerlessness could never allege the "continued frustration of the will of a majority of voters" that *Bandemer* requires. 478 U.S. at 133 (plurality opinion).

Under any of these three indicia, a plaintiff must prove facts that have nothing to do with the challenged map and, in practice, never exist. Indeed, the one case in which a federal court did find a viable *Bandemer* claim – *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992) – would have ended with a dismissal on the pleadings under the test enunciated by the District Court in this case. *Martin* was a challenge to a statewide system for electing trial judges that had resulted in the election of just one Republican in 90 years. *See id.* at 947-49. The court rejected the defendants' demand that Republicans show they had been completely "shut out" of the political process. *See id.* at 958. Requiring members of a major political party to allege that they have been *silenced* would be to "hold, in effect, that regardless of the specific allegations of its complaint an identifiable political group could not survive a motion to dismiss or prevail on the merits of its claim." *Id.* Such a construction, the court noted,

"would render nugatory [*Bandemer*'s] holding that political groups may bring claims of partisan gerrymandering." *Id.*

Furthermore, the three indicia of political powerlessness were not the factors on which this Court relied in evaluating whether the *Bandemer* plaintiffs had stated a valid partisan-gerrymandering claim. The *Bandemer* plurality did not, for example, evaluate whether Democratic voters remained free to speak on issues of public concern, potentially could influence Republican legislators, or were able to elect some Democratic legislators. Instead, this Court rejected plaintiffs' claim because they had failed to establish that the disproportionate result of *one* election had predictably resulted from the redistricting plan or was a reliable predictor of future election results. *See Bandemer*, 478 U.S. at 134-35, 139-40 (plurality opinion). Thus, the Court based its decision on the extent and duration of the plan's likely effects on election outcomes.

In short, to satisfy the "actual discriminatory effects" element of *Bandemer*, a plaintiff need only show (1) that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and (2) that this bias will cause "continued frustration of the will of a majority of the voters." *Id.* at 133 (plurality opinion). To be sure, this will occur infrequently – only where a State is relatively evenly balanced politically, but one party controls both the legislature and the governorship and is able to use that control to push through a congressional redistricting plan designed to entrench a consistent and substantial advantage over the other party. But under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the popular vote statewide.

The allegations in this case thus suffice to make out a partisan-gerrymandering claim under *Bandemer*. The 2001 Plan will achieve its intended effect and produce extremely disproportionate outcomes, resulting in the "continued frustration of the will of a majority of the voters" for at least the next five election cycles – precisely the type of "actual discriminatory effect" that *Bandemer* identified as sufficient to state a political-gerrymandering claim. 478 U.S. at 127, 133, 135, 140 (plurality opinion).

II. UNDER THIS COURT'S *SHAW V. RENO* LINE OF CASES, THE 2001 PLAN UNCONSTITUTIONALLY SUBORDINATES TRADITIONAL NEUTRAL DISTRICTING PRINCIPLES TO RANK PARTISANSHIP.

The 2001 Plan violates the Equal Protection Clause by emphasizing purely partisan considerations to the exclusion of traditional neutral districting principles such as compactness and respect for county and municipal boundaries. In a series of post-*Bandemer* decisions beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), this Court has clarified the boundary between constitutional uses of otherwise permissible districting considerations – such as race or party affiliation – and unconstitutional discrimination. In evaluating a claim of race-based redistricting, the *Shaw* Court held that a state legislature may not jettison neutral districting principles with the predominant purpose of advantaging or disadvantaging a particular group of voters. *Id.* at 642; *see also Miller v. Johnson*, 515 U.S. at 916-17. The Court determined that the consideration of race – which is unquestionably legitimate in redistricting decisions under Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c – becomes illegitimate when race is considered to the exclusion of other traditional neutral districting principles such as "compactness,

contiguity, and respect for political subdivisions." *Shaw*, 509 U.S. at 647. The Court's holding was based in part on its concern for the *expressive* harms that stem from governmental classification of voters on the basis of their race, and in part on its concern for *representational* harms:

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 648; *accord Miller*, 515 U.S. at 911-12.

The holdings in *Shaw* and *Miller* apply here as well, for two reasons. *First*, the representational harms the Court identified are, if anything, more acute in cases of partisan gerrymandering. When district lines are drawn solely to strengthen one party's grip on a district, the legislature sends an unmistakable message to the representative of that district that he or she need only respond to the concerns of that party's voters. *Second*, just as classifications based on race are of particular concern under the Equal Protection Clause, classifications based on partisan affiliation or political viewpoint are generally barred by the First and Fourteenth Amendments, as this Court has repeatedly stated in the political-patronage cases. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *see also Police Dep't v. Mosley*, 408 U.S. 92, 94-95 (1972). The State's burden of justifying laws that discriminate on the basis of political views is indeed a heavy one. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (plurality opinion). That burden should apply where a districting map is based entirely on the goal of maximizing the voting power of one party at the

expense of another, while subordinating traditional neutral districting principles.

The Court's opinions in *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001), which drew a distinction between race and politics as districting concerns, do not bar application of the *Shaw* approach to political-gerrymandering cases. In those cases, the Court held that a district is not drawn predominantly on the basis of race in violation of *Shaw v. Reno* where the evidence is equally consistent with "a constitutional political objective" – there, the creation of a single safe Democratic seat. *Easley*, 532 U.S. at 238. The claim was that the legislature was seeking to separate Democrats from Republicans to create both a Democratic-leaning district and neighboring Republican-leaning districts. Although these decisions affirm that political considerations often are permissible in districting, they do not stand for the proposition that a concerted effort to minimize the voting strength of a disfavored political party *statewide*, accompanied by a complete subordination of neutral districting criteria, is less of a constitutional concern than a comparable effort to separate voters based on race.

The 2001 Plan is clearly unconstitutional under the principles announced in *Shaw*. Here, Republican legislators, in a single-minded effort to maximize their partisan advantage, jettisoned the neutral districting principles that they had codified only two years earlier. *See* J.S. App. 30a-34a, 49a. On an almost perfect party-line vote, the Michigan House of Representatives rejected an alternative map whose district lines broke *half* as many county boundaries as did the 2001 Plan. *Id.* 31a-32a. Because Michigan's 1999 Congressional Redistricting Act requires *minimizing* the number of county and municipal boundaries broken by congressional district lines, the alternative plan clearly

demonstrated the illegality of the 2001 Plan. Even after the Republican legislators reinterpreted their governing criteria to overcome this problem, a second alternative plan then demonstrated that the 2001 Plan did not fully satisfy those criteria. *Id.* 41a-42a. The 2001 Plan thus can rationally be viewed only as an effort to classify voters on the basis of their political-party affiliation, without regard to the neutral districting principles the Michigan Legislature itself adopted. *See Shaw*, 509 U.S. at 644; *Miller*, 515 U.S. at 913.

This Court, having interpreted the Fourteenth Amendment as requiring strict scrutiny of districts drawn predominantly on the basis of voters' race, should take the next step and recognize that districts drawn predominantly on the basis of voters' political viewpoint are also constitutionally suspect. Appellants have alleged that the Michigan Legislature abandoned the neutral districting principles that it had codified in 1999 and reenacted in 2001 – including minimization of county-boundary and municipal-boundary breaks – to ensure that Republicans will win two-thirds of Michigan's districts even if Democrats receive a majority of votes statewide. Those allegations should clearly suffice to state a cognizable equal-protection claim.

III. ENACTMENT OF THE 2001 PLAN EXCEEDED THE STATE LEGISLATURE'S LIMITED AUTHORITY TO REGULATE FEDERAL ELECTIONS UNDER ARTICLE I.

The 2001 Plan also violates Article I of the Constitution because the Elections Clause does not give state legislatures the power to rig congressional elections and thereby thwart effective majority rule. But the District Court did not even consider Appellants' Elections Clause claim. The court instead held that the Michigan Legislature's power to draw congressional districts flows solely from Section 2 of Article

I – not from Section 4's Elections Clause – and thus Section 4 "has no role to play." J.S. App. 15a.

The District Court's understanding of Section 4's Elections Clause is blatantly incorrect. As a different three-judge federal district court noted earlier this year, "[n]o case – or any other authority – has ever expressed doubt that this constitutional provision applies to congressional redistricting." *Smith v. Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss.) (three-judge court), *prob. juris. noted sub nom. Branch v. Smith*, 122 S. Ct. 2355 (2002). Indeed, this Court has repeatedly recognized that the power to prescribe the "Places and Manner of holding Elections for . . . Representatives" encompasses the power of congressional redistricting. *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 26 (1892); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567, 569-70 (1916); *Smiley v. Holm*, 285 U.S. 355, 363-73 (1932); *Holder v. Hall*, 512 U.S. 874, 898 (1994) (Thomas, J., concurring in the judgment); *Bush v. Vera*, 517 U.S. 952, 1047 (1996) (Souter, J., dissenting).

Moreover, the Elections Clause of Article I, Section 4 fundamentally limits a state legislature's power to gerrymander congressional districts. To date, this Court has not addressed the contours of those limits in a political-gerrymandering case; indeed, many of the post-*Bandemer* political-gerrymandering cases, like *Bandemer* itself, have involved state-legislative redistricting, to which Article I does not apply. But in the context of a State's regulation of federal elections, recent decisions by this Court have made clear that Article I forbids States from using their Elections Clause authority to thwart the will of a majority of the

voters, as the Michigan Legislature has done in enacting the 2001 Plan.[4]

In Article I of the Constitution, the Framers vested the legislative power of the United States in two chambers: the Senate, which was intended to represent the States, and the House of Representatives, which was intended to represent the People, and whose members were accordingly to be chosen "by the People of the several States." U.S. CONST. art. I, § 2. Under the Article I framework, the right to choose congressional representatives "belongs not to the States, but to the people," since "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." *U.S. Term Limits*, 514 U.S. at 821. This Court has held that the fundamental principle that the House of Representatives is to be chosen "by the People" forbids States from valuing one person's vote in a congressional election more than another's, *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); from forbidding congressional candidates who have served more than two terms to appear on the ballot, *see U.S. Term Limits*, 514 U.S. at 832-35; and from noting on the ballot a congressional candidate's failure to support term limits, *see Cook v. Gralike*, 531 U.S. at 525-26. This principle also forbids States from distorting

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[4] In a recent speech to the Federalist Society, Professor McConnell argued that *state-legislative* districting plans that "systematically prevent[] effective majority rule" should be invalidated under the Republican Form of Government Clause, U.S. CONST. art. IV, § 4, rather than the Equal Protection Clause. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000); *see also id.* at 116 ("Partisan gerrymandering . . . [that gives] a political minority effective control . . . is in obvious tension with the values of Republicanism."). As explained below, Article I provides a particularly strong basis for challenging a *congressional* plan that systematically frustrates effective majority rule.

congressional district lines to favor the party that momentarily controls the legislature, at the expense of the majority of the electorate.

Consistent with their vision of the House of Representatives as accountable to the people rather than to the States, the Framers limited the States' involvement in congressional elections to a tightly circumscribed power to set "[t]he Times, Places and Manner" of holding federal elections under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1. This limited delegation of authority to regulate the procedures for conducting congressional elections reflects the Framers' "overriding concern" regarding "the potential for States' abuse of the power." *U.S. Term Limits*, 514 U.S. at 808-09. The Framers were particularly worried that factional control of state legislatures might frustrate the will of the people in congressional elections. Discussing the Elections Clause at the Constitutional Convention, Madison noted:

> It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

2 *Records of the Federal Convention* 239. Madison's fear that a state legislature might abuse its authority to override majority rule was echoed throughout the ratifying conventions.

In Massachusetts, one delegate worried that state legislatures,

> when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors.

2 *Elliot's Debates* 22-35 (Parsons). Another delegate noted that "a part [of Congress] should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections," since "the [state] legislature may have a power to counteract the will of a majority of the people." 2 *id.* (Dana). In North Carolina, a delegate explained that limiting the state legislatures' authority over congressional elections would help "to secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 *Annals of Congress* 768-73 (Ames).

The Elections Clause was thus drafted not as a grant of plenary power, but rather as a limited delegation of authority to the States, confined to procedural matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. at 366. As the Court said in *U.S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. at 833-34; *accord Gralike*, 531 U.S. at 523.

This Court has made clear that judicial review of state regulation of election procedure to determine whether it satisfies these principles is more searching in the context of congressional redistricting than is similar review of state-

legislative redistricting under the Equal Protection Clause. For example, while the Equal Protection Clause requires adherence to the "one person, one vote" principle in the context of state-legislative redistricting, it affords more flexibility to States to deviate from absolute population equality in pursuit of legitimate state policies than does Article I, Section 2, which applies to congressional redistricting. Accordingly, while this Court has held that the Equal Protection Clause will tolerate population deviations at least as large as ten percent in the context of state-legislative redistricting, *see Brown v. Thomson*, 462 U.S. 835, 842-43 (1983), Article I will not tolerate even *de minimis* population deviations below one percent without adequate justification, *see Karcher*, 462 U.S. at 731-32.

Similarly, while the Constitution may tolerate somewhat larger departures from absolute neutrality in state-legislative redistricting, Article I strictly constrains the political faction that happens to control the state legislature at the right moment in the decennial congressional redistricting cycle from dictating the composition of the State's congressional delegation, at the expense of the right of "the people [to] choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 793 (citation and internal quotation marks omitted). As Judge Niemeyer explained in a dissent that foreshadowed this Court's decisions in *U.S. Term Limits* and *Gralike*, "[t]here are fundamental differences between congressional districting under Art. I . . . [and] state legislative reapportionments." *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 402 (D. Md. 1991) (three-judge court) (Niemeyer, J., dissenting) (citation and internal quotation marks omitted), *summarily aff'd*, 504 U.S. 938 (1992). Under Article I, "the State may not attempt to dictate the outcome of congressional elections" by

drawing congressional districts that confer a substantial advantage on one political party. *Id.* at 402-03.

The 2001 Plan exceeds these limits on a State's authority to regulate congressional elections. *First*, it is designed to "dictate electoral outcomes": under the plan, the outcomes of elections in 14 of Michigan's 15 congressional districts are preordained, giving Michigan voters little more than the power to ratify results already engineered by the state legislature's mapmakers. *See U.S. Term Limits*, 514 U.S. at 833-34; *Gralike*, 531 U.S. at 523. *Second*, the 2001 Plan frustrates the majority's will by drawing districts that dispense with the State's duly enacted neutral districting criteria to maximize Republican advantage in congressional elections.

The 2001 Plan is thus much more than a mere procedural regulation. It discriminates against Democratic candidates and voters and virtually guarantees a minority party's dominance for a decade. As such, it is an unconstitutional abuse of the Michigan Legislature's power under Article I of the Constitution.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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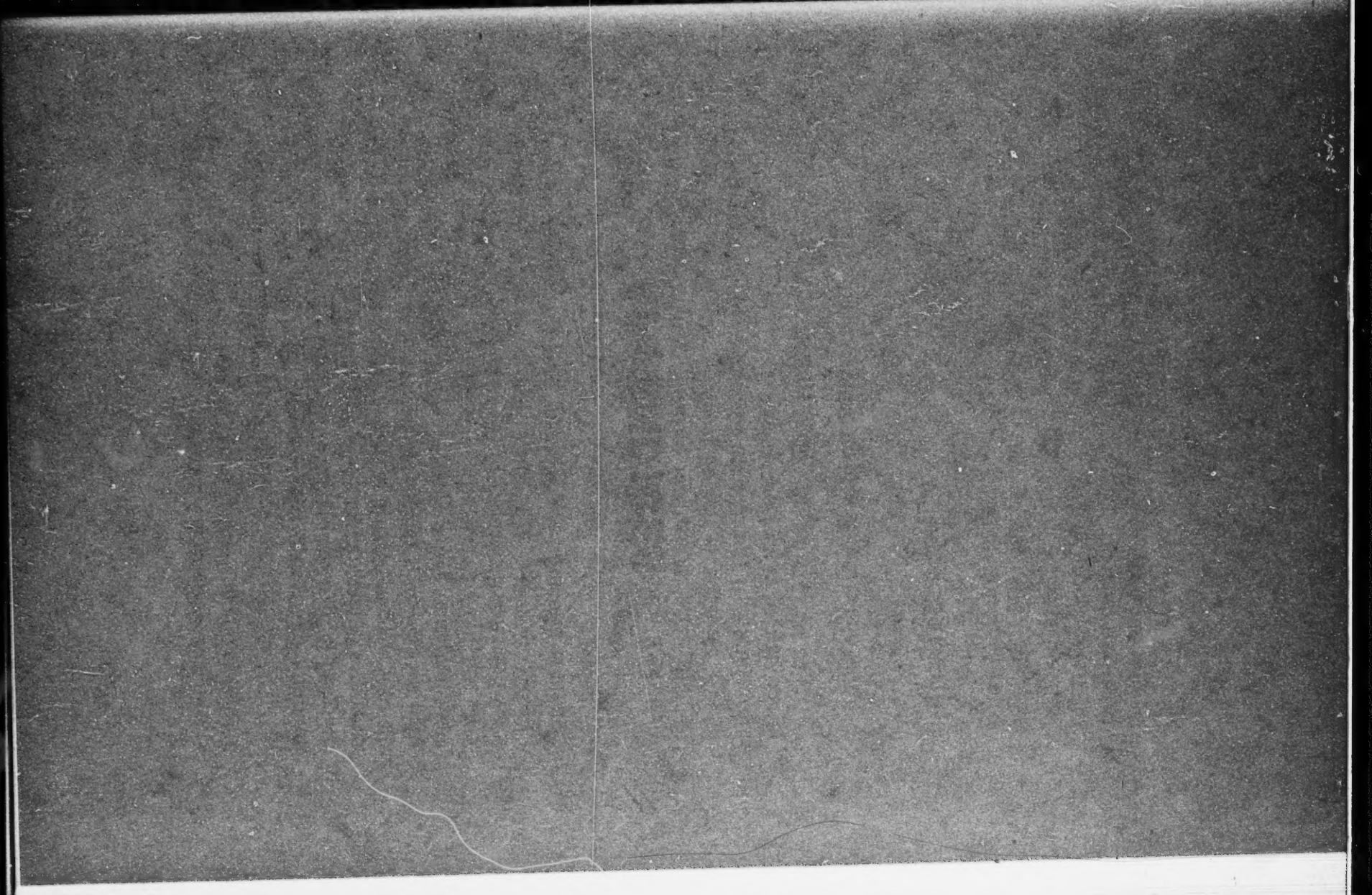
APPENDICES



APPENDIX A

United States District Court,
E.D. Michigan,
Southern Division.

Pat O'Lear, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, Charlie Harrison, III, James Larkin, Christopher Smith, Donald Rittering, Barbara Long, George Gaines, and Minnie H. Whiting,

Plaintiffs,

v.

Candice S. Miller and Christopher Thomas,

Defendants,

and

Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske,

Defendant-Intervenors.

Case Number 01-72584-BC.

May 24, 2002.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART THE MOTIONS TO DISMISS, DISMISSING CLAIM III WITHOUT PREJUDICE, AND DISMISSING ALL OTHER CLAIMS WITH PREJUDICE

Plaintiffs, a group of registered Michigan Democrats, bring this action challenging Michigan's 2001 congressional redistricting plan. They name Candice S. Miller, in her official capacity as Michigan's Secretary of State, and Christopher M. Thomas, in his official capacity as Michigan's Director of Elections, as defendants. The Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske have intervened as defendants.

Pursuant to Rule 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure, defendants request that this court dismiss plaintiffs' lawsuit for failure to state a claim upon which relief can be granted. We grant defendants' motions in part, dismiss plaintiffs' equal protection claim without prejudice, dismiss plaintiffs' remaining claims with prejudice, and grant plaintiffs leave to amend their complaint within thirty days of the date of this Order.[1]

I.

Assuming the truth of plaintiffs' factual allegations and construing the inferences from those allegations in the light most favorable to plaintiffs, the relevant facts are as follows.

On July 11, 2001, the Michigan legislature, by a virtual straight party-line vote, passed the congressional redistricting plan that is the subject of this lawsuit. On September 11, 2001,

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[1] Because 42 U.S.C. § 1983 is not a source of substantive rights, we do not address plaintiffs' section 1983 claim. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 452 (6th Cir. 2002).

Michigan's governor signed the bill containing the challenged plan into law.

The districts in existence prior to the challenged plan's enactment were drawn in 1992 by a three-judge district court. *See Good v. Austin,* 800 F. Supp. 551 (E.D. Mich. 1992). In the most recent elections conducted using the court-drawn districts, Democratic candidates received 54.8% of the majority-party vote. This percentage closely corresponds to the number of congressional seats Democrats currently control in Michigan, 9 out of 16 – roughly 56.3% of the available seats.

Moreover, the margin by which Democrats carried the statewide vote increased from seven percentage points in 1996 (53.5% to 46.5%) to slightly more than nine percentage points in 2000. Given this increased margin, and given our obligation to construe the facts in the light most favorable to plaintiffs, we conclude for the purposes of our decision today that the Michigan electorate has been trending Democratic in recent years.

Despite the increasing majority of Democratic voters in Michigan, Republicans are likely to win ten of Michigan's fifteen congressional seats under the challenged plan. On the basis of this disproportionate representation and its potential to continue for a prolonged period of time, plaintiffs claim that the challenged plan violates several provisions of the United States Constitution: Article I, sections 2 and 4 (as amended by section 2 of the Fourteenth Amendment), the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment, and the First Amendment.

Plaintiffs also claim that the challenged plan limits the voting strength of Michigan's – staunchly Democratic – African-American voters by dispersing African-American populations

throughout Republican districts. Plaintiffs concede, however, that no African-Americans residing outside of Wayne County could conceivably reside in a majority-minority district and do not claim that the "dilution" of African American voting strength stems from racial – as opposed to political – animus. Nevertheless, plaintiffs claim that the challenged plan violates the Fifteenth Amendment and section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

In addition to the purported deficiencies laid out above, plaintiffs claim the challenged plan's legitimacy is impaired by a host of procedural defects accompanying its enactment. The Michigan Supreme Court, however, resolved plaintiffs' procedural claims against them in *LeRoux v. Secretary of State,* 465 Mich. 594, 640 N.W.2d 849 (2002), and we do not address them here.

II.

The standard for dismissal under Rule 12(b)(6) is identical to that for judgment on the pleadings under Rule 12(c). *Mixon v. State of Ohio,* 193 F.3d 389, 400 (6th Cir. 1999). Under that standard, we may not dismiss plaintiffs' complaint unless we are convinced that plaintiffs can prove no set of facts that would state a claim upon which relief could be granted. *Nelson v. Miller,* 170 F.3d 641, 649 (6th Cir. 1999).

A.

Our analysis of plaintiffs' equal protection claim begins with the Supreme Court's decision in *Davis v. Bandemer,* 478 U.S. 109 (1986). There, Democratic plaintiffs challenged Indiana's 1981 reapportionment plan, claiming it represented an unconstitutional partisan gerrymander. In the first elections held

under the 1981 plan, Democrats received 51.9% of the votes cast for seats in the Indiana House of Representatives statewide, but secured only 43 out of 100 seats. In the Indiana Senate, Democrats received 53.1% of the votes cast statewide, and 13 out of 25 Democratic candidates were elected. Relying on these election results, a three-judge district court found the reapportionment plan violated the Equal Protection Clause. The district court concluded that the 1981 plan was unconstitutional because it "purposely inhibit[ed] . . . proportional representation," and was therefore unacceptable. *Id.* at 116 (discussing the district court's opinion) (citation omitted).

The defendants appealed to the Supreme Court, arguing that the case was nonjusticiable and that the plaintiffs had failed to state a cognizable equal protection claim. *Id.* at 118.

The Supreme Court found that partisan gerrymandering claims are justiciable under the Equal Protection Clause, but it rejected the district court's conclusion that the plaintiffs stated a cognizable equal protection claim. A plurality of the Court stated that to prevail on a valid partisan gerrymandering claim the plaintiff must prove "[1] intentional discrimination [2] against an identifiable political group and [3] an actual discriminatory effect on that group."[2] *Id.* at 127. Having identified these elements, the

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[2] A fragmented Court decided *Bandemer*. Because the opinion of *Bandemer*'s four justice plurality provides the narrowest ground in support of its judgment, this court is bound by the plurality's reasoning. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal citation and (continued...)

plurality allowed as how the requirements "may be difficult of application." *Id.* at 142. The Court's observation pointed primarily to the third element – proof of actual discriminatory effect – inasmuch as intent to discriminate against an identifiable group can readily be established in a partisan division of electoral districts. It is proof of the third element that the *Bandemer* Court found wanting in that case.

Here, like in *Bandemer,* the first two elements are easily satisfied. Defendants do not contest the intentional discrimination element. *Cf. id.* at 129 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."). Moreover, as registered Democrats, plaintiffs are an identifiable group. *See, e.g., Vieth v. Commonwealth of Penn.,* 188 F. Supp. 2d 532, 544 (M.D. Pa. 2002) ("Clearly, by alleging that they are Pennsylvanian citizens who vote for Democrats, Plaintiffs have satisfied this requirement.").

It was in defining the third element – "an actual discriminatory effect" – that the Supreme Court reflected its reluctance to interfere with an essentially political – although justiciable – controversy which infuses all partisan gerrymandering cases. The Court acknowledged "the delicacy of intruding on this most political of legislative functions," *id.* at 143, by setting a high threshold for demonstrating "an actual discriminatory effect." Consequently, a redistricting plan may be drawn "with the specific intention of disadvantaging one political party's election prospects," *id.* at 139, and may cause election results that are

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[2](...continued)
punctuation omitted). *See also Republican Party of North Carolina v. Martin,* 980 F.2d 943, 955 n.22 (4th Cir. 1992) (finding *Bandemer* plurality opinion binding under *Marks*).

unfair because they are disproportional to the percentage of the population voting for that party on a state-wide basis, and yet not violate the Constitution. *Id.* at 132, 139. To prove unconstitutional discrimination, the under-represented political group must also show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

It is the task of the courts, then, to distinguish between those partisan redistricting plans which are merely unfair, as this one is alleged to be, and those which are unconstitutional. Drawing our guidance from *Bandemer,* we find that the allegations in the amended complaint do not adequately state that Michigan's redistricting plan will cause an actual discriminatory effect which results in a violation of the Equal Protection Clause.

Bandemer's standard for demonstrating an "actual discriminatory effect" is somewhat murky. The plurality's most definitive articulation of the requirements is as follows: "[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will *consistently degrade* a voter's or a group of voters' *influence on the political process as a whole.*" *Id.* at 110 (emphasis added). For majority party plaintiffs, such as those before this court, this means "a finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters.*" *Id.* at 133 (emphasis added).

In terms of the details underlying such proof, the *Bandemer* plurality never offered a checklist of features which together would comprise a systemic frustration of majority will. Rather, the Court found the lower court's conclusion unsupported because there was no finding that the election results in that case were preordained by Indiana's reapportionment act, especially in a

"swing state" where block voting is not the unalterable norm and future election results could differ. Thus, there was no proof that the complaining group would retain minority status throughout the decade or that it had "no hope" of improving its fate in the next reapportionment. *See id.* at 135-36.

In other words, disproportionate election results will not establish a constitutionally infirm districting plan without a showing of some substantial permanency to the arrangement that cannot be overcome through the political process. In ordering this requirement, the Court's focus was not on the political party but on the voters (or group of voters) who are denied the opportunity to participate – are essentially "shut out of the political process" – and who cannot achieve fair representation without the intervention of the courts. *Id.* at 136-37. Thus, the *Bandemer* plurality observed that "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory." *Id.* at 135. This is especially true in a competitive state – like Michigan – where a moderate shift in voting trends could result in majority status for the minority party.

The plaintiffs in this case have not alleged that they have been shut out of the process or that the challenged congressional redistricting plan is one from which they cannot recover or substantially improve upon. For instance, in *Bandemer*, gubernatorial approval was necessary to sign an Indiana reapportionment bill into law. Because gubernatorial elections are determined by statewide races, which are presumably immune to gerrymandering of any sort, the *Bandemer* plaintiffs' chances of

"doing better" in the next reapportionment could similarly turn on circumstances beyond the actual effects of a partisan gerrymander, but wholly congruent with voter will.[3] Thus, the requirement of "permanency" is not significantly less applicable to plaintiffs' claim than it was to the claims of the *Bandemer* plaintiffs. *Cf. Terrazas v. Slagle,* 821 F. Supp. 1162, 1174 (W.D. Tex. 1993) (finding a wronged partisan group could demonstrate discriminatory effects under *Bandemer* "if it presents evidence of a group perpetuating its power through gerrymandering in one political structure and that the wronged partisan group cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures").

Therefore, absent proof of discriminatory effect through some other avenue, plaintiffs' allegations cannot support a cognizable equal protection claim.

In rejecting both the district court's view and Justice Powell's concurring view as to what constitutes a cognizable equal protection claim, the *Bandemer* plurality suggested two alternative avenues through which plaintiffs could state a cognizable claim: (1) alleging that the challenged plan resulted in their complete

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[3] As opposed to identifying an actual *effect* of a partisan gerrymander, the "no chance of doing better" requirement seems to reflect the plurality's notions of judicial restraint. *Cf. Bandemer,* 478 U.S. at 134 ("[I]t is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are *sufficiently serious to require intervention by the federal courts* in state reapportionment decisions."). That is, the "no chance of doing better" requirement possibly reflects an effort to keep federal courts out of political disputes that are amenable to political solutions. Although it is awkward to apply the "no chance of doing better" requirement to the issue of whether plaintiffs have pled discriminatory effect, we cannot ignore *Bandemer*'s instruction that we do so.

exclusion from the political process or (2) alleging that elected officials would be wholly indifferent to plaintiffs' interests.[4]

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[4] Both alternate showings stem from the Court's earlier decisions involving racial gerrymandering claims in individual multimember districts. The *Bandemer* plurality recognized the distinction between claims brought by minority and majority plaintiff groups. *See Bandemer*, 478 U.S. at 133, 137 (noting that "a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process" and that the "participatory approach to the legality of individual multimember districts is not helpful where the claim is that such districts discriminate against Democrats").

Nevertheless, the *Bandemer* plurality did not suggest that the district context renders those showings inapplicable to majority party claims. Indeed, some courts have read the plurality's suggestion that these alternate proofs were *sufficient* to support an equal protection claim to indicate that such proofs were also *necessary* to an equal protection claim. *See, e.g., Badham v. March Fong Eu*, 694 F. Supp. 664, 668 (N.D. Cal. 1988), *summarily aff'd*, 488 U.S. 1024 (1989) (refusing to sustain Republican claims of unlawful political gerrymandering where plaintiffs did not allege that they had been "'shut out' of the political process" or "that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning").

We agree that a showing of this magnitude might be necessary when the plaintiffs seek to attack the design of a particular district with respect to contiguity, compactness, or other design factors that could, if sufficiently egregious, in fact interfere with core party functions or constituents' ability to influence their congressperson. *See, e.g., Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C.), *summarily aff'd*, 506 U.S. 801 (1992) (noting the disruptive effect a district could have that passes through three different media markets). Where the plaintiffs challenge a reapportionment plan as a whole, however, we do not read *Bandemer* to require this type of showing, although, as described above, we

(continued...)

Because plaintiffs do not claim that victorious Republican candidates would be indifferent to the interests of their Democratic constituents or that they have been completely shut out of the political process, they fail to state an equal protection claim upon which relief can be granted.

1.

The *Bandemer* district court found discriminatory effects sufficient to sustain an equal protection claim after the plaintiffs demonstrated that the proportion of Democratic candidates elected in the first election using the 1981 plan's districts did not correspond to the percentage of votes garnered by Democrats. The *Bandemer* plurality, however, rejected the notion that disproportionate representation alone could satisfy the discriminatory effects requirement. In rejecting the district court's conclusion, the plurality noted that in cases involving individual multimember districts, in which the Court had found an equal protection violation, the Court had available evidence suggesting that the excluded groups had "less opportunity to participate in the political process and to elect candidates of their choice." *Id.* at 131. Because the *Bandemer* plurality was unwilling to presume, "without actual proof to the contrary," that elected candidates would "entirely ignore the interests of [the excluded groups]," it found that disproportionate representation alone would not diminish a group's electoral power sufficiently to satisfy the discriminatory effects requirement.

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[4](...continued)
believe it certainly could provide alternate grounds for relief.

Thus, *Bandemer* suggests that disproportionate representation combined with actual proof that elected officials would ignore the interests of the excluded group would satisfy its discriminatory effects requirement. Accordingly, plaintiffs' allegations of disproportionate election results, unaccompanied as they are by evidence of Republican indifference to Democratic citizen interests, cannot sustain plaintiffs' claim.

2.

In his concurring *Bandemer* opinion, Justice Powell suggested that a partisan gerrymandering plaintiff could establish an equal protection violation by demonstrating that the district boundaries were drawn solely to achieve partisan goals. *See Bandemer,* 478 U.S. at 161. In its rejection of Justice Powell's approach, the plurality again referenced its previous individual multimember district decisions: "In those cases, the racial minorities asserting the successful equal protection claim had essentially been shut out of the political process." *Id.* at 139; *see also id.* at 136 (noting that in rejecting the plaintiffs' racial gerrymandering claim in *Whitcomb v. Chavis,* 403 U.S. 124 (1971), the Court had observed "that there was no proof that blacks were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when candidates were chosen, or to be included among the candidates slated by the Democratic Party"). Thus, the *Bandemer* plurality suggested that partisan gerrymandering plaintiffs could state a cognizable equal protection claim by demonstrating that their group had been essentially "shut out of the political process."

Here, plaintiffs do not allege that they have been "essentially shut out of Michigan's political process."

Plaintiffs do not allege (1) that they have no chance of obtaining more favorable congressional districts in the next reapportionment; (2) that Republican candidates would be indifferent to the interests of Democratic citizens; or (3) that the challenged plan would result in Democrats being essentially "shut out" of the political process; therefore, plaintiffs do not state a cognizable equal protection claim. Nor does the amended complaint contain allegations from which these consequences could be inferred.[5]

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[5] The plaintiffs also claim that the Supreme Court in *Shaw v. Reno,* 609 U.S. 630 (1993), and *Miller v. Johnson,* 515 U.S. 900 (1995), suggested that the mere failure to use politically neutral redistricting principles itself violates the Equal Protection Clause. We find no support in either case for this proposition. The Supreme Court has in fact consistently acknowledged that political considerations inevitably play a major role in redistricting decisions:

> It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. The very essence of districting is to produce a different – a more 'politically fair' – result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what

(continued...)

In *Bandemer,* the plurality expressed its confidence in our "abilities to distinguish between disproportionality *per se* and the lack of fair representation that continued disproportionality in conjunction with other indicia may demonstrate." *Bandemer,* 478 U.S. at 143 n.21. We find that the plaintiffs have alleged disproportionality in abundance, and that the amended complaint contains ample charges of discriminatory motive and procedural irregularities. The deficiency here is the lack of any claim of the "other indicia" which is required to show the discriminatory effect which *Bandemer* requires. Bandemer draws no bright lines, and neither do we attempt to set forth the *sine qua non* of an unconstitutional reapportionment scheme, except to say that the plaintiffs must set forth allegations which, if proven, justify court intervention into an essentially legislative process.

Mindful of *Bandemer*'s murky nature and the relatively lenient standard for surviving a motion to dismiss, we will dismiss plaintiffs' equal protection claim without prejudice. Plaintiffs may file a complaint, amended to state a claim under our *Bandemer* analysis, within thirty days of the issuance of this Order.

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[5](...continued)

> district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973) (internal citations omitted).

B.

Article I, section four provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art I, § 4. Plaintiffs claim that the challenged plan represents an unconstitutional abuse of legislative power under section 4.

A state's power to subdivide itself into districts, however, does not stem from section 4. Rather, it stems from Article I, section 2, which provides "Representatives . . . Shall be Apportioned Among the Several States." *See also* U.S. Const. amend. XIV, § 2; *Growe v. Emison,* 507 U.S. 25, 34 (1993) (citing Article I, section 2 for the proposition that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts").

Because section 2 governs intrastate redistricting, section 4's only applicability results from the Supreme Court's admonition that states may not use section 4 to "immunize" action that would otherwise be unconstitutional. *See Wesberry v. Sanders,* 376 U.S. 1, 6 (1964). The political gerrymander before this court is not otherwise unconstitutional; therefore, there is nothing to immunize and section 4 has no role to play.

Accordingly, we dismiss Claim I with prejudice.[6]

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[6] Because section 2 does not protect against partisan gerrymandering, *see Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws,* 781 F. Supp. 394, 398 (D. Md. 1991) *summarily aff'd* 504 U.S. 938 (1992), we (continued...)

C.–

Plaintiffs claim that the challenged plan violates their "freedoms of speech and association in violation of the First Amendment of the United States Constitution." Partisan gerrymandering by itself, however, does not support either a freedom of speech or a freedom of association claim. *See, e.g., Washington v. Finlay,* 664 F.2d 913, 928 (4th Cir. 1981) ("[W]here there is no device that directly inhibits participation in the political process, the First Amendment . . . offers no protection of voting rights beyond that afforded by the [F]ourteenth and [F]ifteenth Amendments."); *Badham,* 694 F. Supp. at 675 ("While plaintiffs may be discouraged by their lack of electoral success, they cannot claim that [the reapportionment plan] regulates their speech or subjects them to any criminal or civil penalties for engaging in protected activities."). Thus, plaintiffs fail to state a claim under the First Amendment upon which relief can be granted.

Accordingly, we dismiss Claim II with prejudice.

D.

The Privileges and Immunities Clause of the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. For some time, the Privileges and Immunities Clause has been treated as "essentially dormant." *See, e.g., Pope,* 809 F. Supp. at 399 (quoting Laurence H. Tribe, *American Constitutional Law* 548 (2d ed. 1988)). In

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[6](...continued)
dismiss Claim I in its entirety.

Saenz v. Roe, 526 U.S. 489, 502 (1999), however, the Supreme Court determined that the clause protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." Plaintiffs argue that *Saenz* "breathe[d] new life into the clause." (citing *Saenz,* 526 U.S. at 511 (Rehnquist, C.J., dissenting)). They claim that the challenged plan violates the revitalized Privileges and Immunities Clause by denying Democratic voters the right – enjoyed by Republican voters – to fair representation and an effective vote.

We can find no overt support for the proposition that the Privileges and Immunities Clause protects the right to fair representation or the right to an effective vote. *Cf. Pope,* 809 F. Supp. at 399. Moreover, without more explicit guidance, we are reluctant to infer such protection from the Supreme Court's treatment of newly arrived state citizens. Accordingly, we dismiss Claim IV with prejudice.

E.

In *Thornburg v. Gingles,* 478 U.S. 30 (1986), the Supreme Court articulated three preconditions to a cognizable vote-dilution claim under section 2 of the Voting Rights Act:

1. "[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."
2. "[T]he minority group must be able to show that it is politically cohesive."
3. "[T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Id.; see also Voinovich v. Quilter, 507 U.S. 146, 156-57 (1993) (holding that "the *Gingles* preconditions apply in challenges to single-member as well as multimember districts"); *Cousin v. Sundquist,* 145 F.3d 818, 823 (6th Cir. 1998) ("[A] section 2 claim cannot proceed unless all three *Gingles* preconditions are satisfied.").

Plaintiffs admit that "[o]utside of Wayne County, *blacks in Michigan would not reside in a majority-black district under any redistricting plan.*" Moreover, plaintiffs acknowledge that, under the challenged plan, "the entire African American population of Detroit [in Wayne County] has been placed in two districts (the Thirteenth and Fourteenth) *that offer ample opportunity to elect black-preferred candidates.*" (emphasis added). Thus, minority voters cannot demonstrate that their numbers are sufficiently large and geographically compact to constitute a majority in a single-member district, other than in the two districts where they have "ample opportunity to elect black-preferred candidates."

In an effort to salvage their moribund section 2 claim, plaintiffs argue that the challenged plan's failure to construct districts that would permit minorities to "have a significant impact on congressional elections" constitutes a section 2 violation.

The Supreme Court has not expressly decided whether section 2 permits influence claims. *See Voinovich,* 507 U.S. at 154-57 (assuming, without deciding, that an influence claim was actionable). In *Cousin,* however, the Sixth Circuit rejected the idea that an impairment of minority voters' ability to influence, rather than determine, the outcome of an election supported a cognizable section 2 claim. *Cousin,* 145 F.3d at 828-29 ("[W]e do not feel that an 'influence' claim is permitted under the Voting Rights Act.").

Because plaintiffs cannot satisfy the *Gingles* preconditions and because we do not recognize "influence" claims, plaintiffs cannot state a claim under the Voting Rights Act. Accordingly, we dismiss Claim VII with prejudice.

F.

The Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." U.S. Const. amend. XV, § 1. As discussed above, plaintiffs cannot state a cognizable vote dilution claim; therefore, we need not address whether the Fifteenth Amendment covers plaintiffs' vote dilution claim. Because plaintiffs do not allege racial animus, they cannot state a cognizable claim under the Fifteenth Amendment. *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 61-66 (1980) (plurality decision). Accordingly, we dismiss Claim V with prejudice.

III.

It is ORDERED that plaintiffs' equal protection claim is dismissed without prejudice and plaintiffs' remaining claims are dismissed with prejudice. Plaintiffs may amend their complaint within thirty days of the date of this Order. If plaintiffs do not amend their Complaint within 30 days, the matter shall be closed, and further challenges to the redistricting plan based on new evidence after subsequent elections, if any, shall require a new filing. Our determination today does not change the application of our April 24, 2002, Order imposing a June 11, 2002, deadline for receiving nominating petitions, which remains in full force and effect.

APPENDIX B

United States District Court,
E.D. Michigan,
Southern Division.

Pat O'Lear, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, Charlie Harrison, III, James Larkin, Christopher Smith, Donald Rittering, Barbara Long, George Gaines, and Minnie H. Whiting,
Plaintiffs,
v.
Candice S. Miller and Christopher Thomas, Defendants,
and
Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske,
Defendant-Intervenors.

Case Number 01-72584-BC.

June 5, 2002.

ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE AND DENYING EMERGENCY MOTION FOR EXPEDITED TRIAL AS MOOT

BOYCE F. MARTIN, JR., Chief Circuit Judge.

On May 24, 2002, this Court filed an Opinion and Order dismissing the third claim of the plaintiffs' amended complaint without prejudice, dismissing the remainder of the plaintiffs' claims with prejudice, and granting the plaintiffs leave to file an

amended complaint within thirty days. On May 29, 2002, the plaintiffs filed a Second Amended Complaint and an Emergency Motion for Expedited Trial, which sought a trial from June 4 through June 6, 2002, with a decision to be rendered by June 7, 2002.

The Court has reviewed the Second Amended Complaint, and finds that it, like its immediate predecessor, fails to state a claim under the Fourteenth Amendment to the United States Constitution upon which relief can be granted. In its Opinion and Order, this Court found that "disproportionate election results will not establish a constitutionally infirm districting plan without a showing of some substantial permanency to the arrangement that cannot be overcome through the political process." *O'Lear v. Miller,* No. 01-72584, 2002 WL 1052046, at *3 (E.D. Mich. May 24, 2002) (three-judge panel). The plaintiffs admit that Democrats may gain control of one or both houses of the Michigan legislature within the next decade, although they claim that the redistricting plan may make it more difficult for them to do so. Second Am. Compl. ¶ 55. Nonetheless, the pleading itself concedes that a political solution to their redistricting complaint is within reach by the next decade, or such other time as redistricting may lawfully occur at the direction of the state legislature.[1]

The plaintiffs' attempt to state a claim under the alternative test that their elected Republican representatives will be "indifferent" to their interests fares no better. Political gerrymandering does not offend the Fourteenth Amendment simply because certain voters are members of the minority party in the district. If so, every "safe" district would violate the Equal

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[1] There is no Michigan constitutional provision which prescribes the frequency with which redistricting must or may occur. That decision, like the districting process itself, is left to the state legislature.

Protection Clause. Rather, the plaintiffs must demonstrate that their interests will in fact be "entirely ignore[d]" by their representatives. *O'Lear*, 2002 WL 1052046 at *4. The plaintiffs themselves admit that their representatives are likely to "respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved." Second Am. Compl. ¶ ¶ 56-57.

The Court has the power to dismiss a complaint *sua sponte* pursuant to Rule 12(b)(6), provided that the plaintiffs have been given adequate notice and an opportunity to amend. *See Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983). The Court finds that the plaintiffs in this case received adequate notice through this Court's Opinion and Order dismissing of their equal protection claim without prejudice and with leave to amend. The plaintiffs having failed to submit an amended complaint upon which relief can be granted, this Court finds that *sua sponte* dismissal is appropriate.

Accordingly, it is ORDERED that the Second Amended Complaint [dkt # 97] is DISMISSED WITH PREJUDICE.

It is further ORDERED that the plaintiffs' Emergency Motion for Expedited Trial [dkt # 98] is DENIED AS MOOT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

NOTICE OF APPEAL OF PLAINTIFFS PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, AND CHRISTOPHER SMITH

Plaintiffs Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith hereby appeal to the Supreme Court of the United States from the Order entered in this matter on June 5, 2002, dismissing Plaintiffs' claims of unconstitutional partisan gerrymandering. The appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,
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Dated: August 2, 2002

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

SECOND AMENDED COMPLAINT

1. The plaintiffs – Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith – have brought this action to enforce voting rights guaranteed to them by the United States Constitution and federal law. As Democratic voters in the State of Michigan, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative. The Michigan Legislature, however, has deliberately redrawn district lines to maximize the number of Republicans likely to be elected in the 2002 congressional elections. The district lines virtually ensure that 9 or 10 Republicans will be elected to Michigan's 15 congressional seats for the next decade, and these Republican Representatives in turn are likely to ignore the interests of their Democratic constituents. While political concerns always play some role in the redistricting process, such partisan gerrymandering, in which partisan concerns have predominated over other traditional redistricting principles, violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES

2. Plaintiff Pat O'Lear resides in Sterling Heights city in Macomb County. His address is 8104 New Bradford, Sterling Heights, Michigan 48312. Prior to the 2001 redistricting, his home was in Michigan's Twelfth Congressional District. Under the 2001 plan, it is in Michigan's Tenth Congressional District.

3. Plaintiff Donald Rittering resides in Salem township in Washtenaw County. His address is 9706 Six Mile Road,

Northville, Michigan 48167. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, it is in the Seventh Congressional District.

4. Plaintiff Kay Ann Chase resides in Charlevoix township in Charlevoix County. Her address is 12492 Pine Ridge, Charlevoix, Michigan 49720. Prior to the 2001 redistricting, her home was in Michigan's First Congressional District. It remains in the First Congressional District under the 2001 plan.

5. Plaintiff Steve Borrello resides in Saginaw city in Saginaw County. His address is 721 South Michigan Avenue, Saginaw, Michigan 48602. Prior to the 2001 redistricting, his home was in Michigan's Fifth Congressional District. It remains in the Fifth Congressional District under the 2001 plan.

6. Plaintiff Lawrence Kestenbaum resides in Ann Arbor city in Washtenaw County. His address is 1726 W. Stadium Boulevard, Ann Arbor, Michigan 48103. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Fifteenth Congressional District.

7. Plaintiff James Larkin resides in Garden City in Wayne County. His address is 1021 West Rose, Garden City, Michigan 48185. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Eleventh Congressional District.

8. Plaintiff Christopher Smith resides in Lincoln Park city in Wayne County. His address is 950 Moran, Lincoln Park, Michigan 48146. Prior to the 2001 redistricting, his home was in Michigan's Sixteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

9. Plaintiff Barbara Long resides in Detroit city in Wayne County. Her address is 11730 Rosemont, Detroit, Michigan 48228. Prior to the 2001 redistricting, her home was in Michigan's Fourteenth Congressional District. Under the 2001 plan, her home is in Michigan's Fourteenth Congressional District.

10. Plaintiff George Gaines resides in Detroit city in Wayne County. His address is 1531 Chateaufort, Detroit, Michigan 48207. Prior to the 2001 redistricting, his home was in Michigan's Fifteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

11. Plaintiff Minnie H. Whiting resides in Pontiac city in Oakland County. Her address is 137 E. Iroquois, Pontiac, Michigan 48341. Prior to the 2001 redistricting, her home was in Michigan's Ninth Congressional District. Under the 2001 plan, her home is in Michigan's Ninth Congressional District.

12. Defendants are Candice S. Miller, the Secretary of State for the State of Michigan, and Christopher Thomas, the Director of Elections for the State of Michigan. Both defendants are sued in their official capacities.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § § 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202 and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

BASIS OF CLAIMS

14. On July 11, 2001, on a straight party-line vote in the Michigan Senate and an almost straight party-line vote in the Michigan House of Representatives, the Republican majorities in

Michigan's legislative chambers passed a congressional redistricting plan ("the Republican Plan") that will radically alter the partisan balance of Michigan's congressional delegation. At present, Michigan has nine Democratic and seven Republican Representatives in Congress. Under the new plan, Michigan is likely to have only five or six Democratic Representatives and nine or ten Republican Representatives for the next decade. (As a result of the 2000 census, Michigan is now entitled to only fifteen congressional seats). Thus, based entirely on redrawing of district lines, the number of Democratic Representatives is likely to decrease by at least one-third.

I. The Republicans Violated State Law In Order To Pass A Partisan Gerrymander.

15. In passing the Republican Plan, the Republicans deviated from the nonpartisan criteria they themselves had helped to establish when they passed the Congressional Redistricting Act of 1999, P.A. 221. Because they could not achieve their desired partisan ends consistent with these criteria, the Republicans "reinterpreted" these criteria in the legislation that included the Republican Plan. This "reinterpretation" violated the Michigan Constitution's mandate that no Act shall take effect immediately unless passed by a two-thirds vote of each house. Mich. Const. art. 4, § 27 ("No Act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."). It also violated the rule against amendment by reference ("No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Mich. Const. art. 4, § 25) and the "two subject rule" ("No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or

amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Mich. Const. art. 4, § 24). The Legislature's willingness to violate the Michigan Constitution underscores the extent to which the Republican Plan was based on partisan considerations.

16. In 1999, the Republicans controlled both houses of the Michigan Legislature, as well as the governorship. As will be set forth below, however, the Republicans understood that Michigan was becoming increasingly Democratic and thus there was a significant chance that Democrats would control at least one legislative chamber at the time of redistricting in 2001. They therefore passed the Congressional Redistricting Act to limit the role of partisan considerations in redistricting. The Act established very specific criteria for congressional redistricting in addition to compliance with federal law. It prioritized those criteria and placed at the top of the priority list that "[e]ach congressional district shall consist of areas of convenient territory contiguous by land," and, after contiguity, that "[c]ongressional district lines shall break as few county boundaries as is reasonably possible." Mich. Comp. Laws § 3.63(c). The Act also provided, further down the priority list, that "[c]ongressional district lines shall break as few city and township boundaries as is reasonably possible." *Id.*

17. The Republican Plan violates these criteria by breaking ten county boundaries and fourteen city or township boundaries when it is "reasonably possible" to draw an alternative redistricting plan that breaks only five county boundaries and ten city or township boundaries. During the legislative session, Democrats introduced a plan that breaks only five county boundaries and ten city or county boundaries. This plan also does not pair in the same district any incumbents seeking reelection and more accurately

reflects the political makeup of the State. (One Democratic incumbent intends to run for Governor, so only fifteen incumbents – eight Democrats and seven Republicans – are seeking reelection.) Nonetheless, this alternative plan was defeated on the floor of the House on July 11, 2001, on a party-line vote (with the exception of one Republican who joined Democrats in supporting the plan).

18. In 1999, when the Legislature passed the Congressional Redistricting Act, it believed that this Act would bind the 2001 Legislature that would control redistricting. As explained above, the Michigan Constitution forbids implementation of legislation until 90 days after conclusion of a legislative session, in the absence of a two-thirds vote. Thus, without a two-thirds vote, the 2001 Legislature could not change the 1999 criteria for enacting a redistricting plan and immediately use those criteria as the basis for enacting a new redistricting plan. Even if the Legislature changed the criteria, the 1999 criteria would apply to 2001 redistricting efforts.

19. Nonetheless, because the Republican Plan clearly violates the statutory criteria set forth in the Congressional Redistricting Act, the 2001 Legislature redefined those criteria under the guise of interpretation. The legislation that includes the Republican Plan first states that "[i]t is the intention of the Legislature to comply fully with section 3 of the Congressional Redistricting Act, 1999 P.A. 221, MCL 3.63," which requires congressional district lines to break as few county boundaries (and as few city or township boundaries) as possible. But it then defines the number of county breaks in the redistricting plan as follows:

> (i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.

(ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.

(iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

To the extent they are comprehensible, these provisions appear to have been designed to justify the Republican Plan and thus must have been intended to govern the enactment of that very Plan. In other words, they were intended to have immediate effect. But the Republicans knew that they did not have the two-thirds majority needed for immediate implementation of the new criteria, and indeed, a Senate vote on whether the legislation should have immediate effect failed to garner the necessary two-thirds vote. The Republicans therefore attempted to circumvent the constitutional requirement for such a two-thirds vote by labeling the new statutory criteria as merely an "interpretation" of existing criteria. Yet the new provisions do not merely interpret the 1999 Act's redistricting criteria; they completely change them and thus required a two-thirds vote that they did not receive. The new redistricting criteria were therefore not in effect when the Republicans enacted the Republican Plan. The 1999 criteria were controlling.

20. The Republicans' willingness to deviate from the nonpartisan redistricting criteria they enacted in 1999 and to circumvent the Michigan Constitution in the process demonstrate that partisanship was the dominant motivation for the Republican Plan. This is also shown by the Republicans' willingness to violate the constitution in other ways. Passage of new redistricting

criteria in the same legislation as a redistricting plan, without re-publication of existing redistricting criteria, violates Michigan's constitutional rules against amendment by reference and inclusion of two subjects in the same law.

II. The Republicans Were Unwilling To Subject Their Redistricting Plan To Public, Or Legislative, Deliberation.

21. The partisan motivation for the Republican Plan is further emphasized by the manner in which that plan was shepherded through the Legislature with little opportunity for evaluation or for presentation of alternative plans. When the Michigan Legislature passed the Congressional Redistricting Act in 1999, it understood the importance of careful deliberation and public input during the redistricting process. It therefore provided that the Legislature "shall enact a redistricting plan for congressional districts" "[n]ot later than *November 1, 2001*." Mich. Comp. Laws § 3.62 (emphasis added). The November 1, 2001 deadline allowed seven months for careful deliberation after receipt of the 2000 census data (which, by federal law, must take place by April 1), while still ensuring that any courts reviewing the redistricting plan would have sufficient time to consider that plan and devise an alternative, if necessary, before the 2002 congressional election cycle gets underway.

22. Michigan law further emphasizes the importance of deliberation and public input in the redistricting process by building in a public comment period during the state judicial phase of the redistricting process. In particular, the law provides that in the event the Legislature is unable to agree on a redistricting plan, the Michigan Supreme Court shall propose a plan for public consideration and "make that plan available for public inspection

at least 30 days before the time set for [a] hearing." Mich. Comp. Laws § 3.74.

23. Federal law also requires a deliberative process. The Voting Rights Act of 1965 prohibits enactment of any redistricting plan that would abridge the right to vote based on race or ethnicity. In reviewing a Michigan redistricting plan under the Voting Rights Act, the Justice Department (or the District Court for the District of Columbia) will consider the "extent to which the [Michigan Legislature] followed objective guidelines and fair and conventional procedures" in enacting the new map, the "extent to which the [Legislature] afforded members of racial and language minority groups an opportunity to participate" in the decision-making process, and the "extent to which the [Legislature] took the concerns of members of racial and language minority groups into account." 28 C.F.R. § 51.57. A process that departs from normal legislative procedures and excludes African-Americans and other minorities from full participation risks rejection by the Justice Department or D.C. District Court.

24. Initially, the Republicans appeared to understand the value that Michigan and federal law places on deliberation and public participation in the redistricting process. When the census data were released in March 2001, the Republican leadership of the Michigan Legislature announced a "framework for redistricting" that included "public hearings across Michigan this summer, with the goal of passing a redistricting plan in the fall." Press Release from the Office of Senate Majority leader Dan L. DeGrow, "Michigan 2000 Census Figures Released: New Legislative Districts to be Developed" (Mar. 28, 2001) (quoting Sen. DeGrow and Sen. Schuette). This schedule provided sufficient time for presentation of alternative plans and reasoned consideration of these plans while nonetheless ensuring that a redistricting plan could be adopted by the Legislature and upheld by the courts well

before the congressional candidates would have to file for the 2002 congressional elections.

25. The Republican leadership later abandoned its proposal for a deliberative process, and instead announced on Friday, June 8, that "organizations and/or interested persons have until noon, Monday, June 18 to submit prepared plans, voting data, or legal analyses relevant to legislative and congressional redistricting." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Legislative Redistricting Input Sought" (June 8, 2001) (quoting Sen. DeGrow and Sen. Schuette). The Senate Majority leadership later granted a one-week extension – until noon on June 25 – for submission of plans. Even with this additional week, there was still very little time for interested parties to engage in the complicated process of drawing maps and ensuring that they complied with all of the necessary legal requirements.

26. Not only did the Republican leadership provide little time for submission of alternative redistricting plans, it provided others little time for consideration of its own plan. When the Republicans first introduced a redistricting bill, on June 14, 2001, they introduced a shell bill that eliminated old congressional-district lines without proposing any new districts. *See* Senate Bill 546 (as introduced, June 14, 2001). The bill was referred to the Committee on Reapportionment that same day.

27. The Republicans did not publicly release the Republican Plan until 1:00 p.m. on June 25, 2001 – *after* the artificial deadline established by the Senate Majority leadership for introduction of plans had expired. The Republicans introduced the plan on the afternoon of June 25 even though the map was likely available far earlier. The Republican staff person who drew the map testified to the Senate Reapportionment Committee that she did so before political data were loaded onto the State's redistricting computers.

Since these data were loaded in April 2001, her testimony suggests that she drew the map at least two months before it was publicly released.

28. On June 25, the Senate Committee on Reapportionment held the first and only hearing at which it discussed specific congressional maps, and it was at this hearing that the Republicans introduced the Republican Plan. The Committee ensured there would be little public participation at this hearing by waiting until the afternoon of Friday June 22 to call the hearing. As a result, the only public participant at the hearing was the Executive Director of the Detroit Chapter of the National Association for the Advancement of Colored People ("NAACP").

29. The Republicans further limited public participation – and analysis of the Republican Plan by the public or by Democrats – through the manner in which they presented the bill. The bill did not include a pictorial representation of the proposed districts. Instead, the bill consisted of a list of counties, cities, and or townships in each district. When only part of a city or township was included in a district, the bill designated the included areas based on the six-digit census-tract numbers and four-digit census-block numbers of those areas. The bill was 167 pages long. Thus, the exact boundaries of each district could only be determined by analyzing thousands of census tract and block numbers – a task that is virtually impossible without a computer.

30. The Senate Republicans refused to provide the proposed map in electronic form even after they were asked to do so. Thus, before the map could be analyzed, the thousands of block numbers had to be manually entered into a computer. Not surprisingly, the Republicans' desire to preclude Democrats and the public from readily analyzing the Republican Plan, and their resultant unwillingness to provide the map in electronic form, resulted in a

major mistake that was not discovered until after both the Senate and House had already passed the Plan, as is set forth below. In other states, it is routine practice for maps to be provided in electronic form to legislators from both political parties – and even to be placed on the World Wide Web for public inspection.

31. The NAACP asked for a 30-day extension to evaluate the map. This request was rejected.

32. The Committee voted in favor of the plan on June 25, 2001, and the full Senate voted to pass the proposed plan on June 26, 2001. Thus, the Senate passed the Republican Plan only a day after it was first introduced. Both in committee and on the floor, votes divided perfectly along party lines, with Republicans voting in favor and Democrats in opposition.

33. The bill moved to the House, where the Committee on Redistricting and Elections met on July 10, 2001, to consider the Senate plan. The House had only one day to consider the plan and reach an agreement with the Senate, as the legislative session was scheduled to end on July 11, 2001. Committee hearings and floor debate were minimal. The Committee heard limited testimony at its July 10 hearing, all of it in opposition to the Republican Plan, but it summarily ignored this testimony. The Committee Chair also summarily dismissed the questions of Democratic committee members on the plan, by either indicating that he did not know the answers to the questions or stating that the members should obtain the answers from Democratic staff. At roughly 11:00 p.m. on July 10, the Committee voted to approve the Republican Plan on a straight-party line vote.

34. The full House considered the Republican Plan well after midnight on the morning of July 11, 2001 – not a time when public scrutiny or rigorous debate was likely to occur. At roughly

2:35 a.m., the House passed the plan on a straight party-line vote (with the exception of one Republican who joined the Democrats because the Republican Plan diluted the political influence of Dearborn's growing Arab-American population) after first rejecting two Democratic alternatives (with the same Republican again the only Representative to break party lines).

35. Later on July 11, the House asked the Senate to return the redistricting bill because it contained a blatant error. The Fifteenth Congressional District was noncontiguous: To traverse it, one would have to leave the Fifteenth and enter the Seventh Congressional District. Thus, the plan passed by both houses violated the *highest*-priority state criterion under the 1999 Congressional Redistricting Act. Democrats and members of the public did not catch the error prior to passage because the Republicans rushed the bill through the Legislature and refused to provide an electronic version of their map. Republicans did not catch the error because they were concerned predominantly with the partisan implications of the Republican Plan and apparently never even analyzed the Plan carefully to determine its compliance with the 1999 Act.

36. When the bill containing the Republican plan was returned to it on July 11, the House amended the bill to make the Fifteenth District contiguous, again passed the bill along party lines (with the same lone Republican dissenter) and returned it to the Senate. The Senate then passed the amended bill, again dividing perfectly along party lines.

37. The bill contained another blatant error, however. Four thousand people were not placed into *any* district in the bill. Thus, the bill plainly violated the principle of one person, one vote. (The state legislative redistricting plan contained a similar but lesser error – one unpopulated census tract was not placed in any

district). Once again, no legislators caught this error because of the rush to enact the Republican Plan. By the time this error became apparent, the Legislature was out of session and was not scheduled to return until September.

38. Senate Secretary Carol Viventi was therefore faced with a choice: presenting the Republican Plan to the Governor despite the blatant error, correcting the error herself, or waiting until the Legislature returned in September and sending the bill back to the Legislature for amendment. Sending the bill back to the Legislature, however, would have opened up the possibility of further debate on the Republican Plan. The Republican leadership and Governor Engler did not wish to open up any such possibility.

39. After a series of meetings with Republican leaders, Secretary Viventi concluded that she had the authority to correct the Republican Plan herself under Joint Rule 12 . That rule states that, "[i]f errors are found in a bill which has been passed by both Houses, the House in which the bill originated may make amendments to correct the errors and shall notify the other House of its action. If the corrective amendments are agreed to by the other House, the corrected bill shall be referred for enrollment printing and presentation to the Governor." Secretary Viventi apparently concluded that this Rule gave her authority to add four thousand people to a congressional district without the approval of either House because the correction was merely "technical" in nature. (In contrast, the Clerk of the House, who controlled presentment of the state legislative redistricting plan to the Governor, apparently concluded that Rule 12 did not provide him authority to correct the similar – but lesser – problem with the state legislative redistricting plan and did not correct that plan.)

40. On September 11, nearly two months after passage of the Republican Plan, Secretary Viventi corrected the Plan and

presented it to the Governor. The Governor signed the bill containing the Republican Plan at 4:54 p.m. on Tuesday, September 11, 2001. Although the Michigan Supreme Court ultimately concluded that Secretary Viventi's actions were permissible, *LeRoux v. Secretary of State*, 640 N.W.2d 849 (Mich. 2002), the fact remains that there was a substantial question as to the legality of her action as evidenced by the dissent in the Michigan Supreme Court. If Secretary Viventi had waited only a couple more weeks, she could have returned the bill to the Legislature to correct the Plan itself. But Republicans wanted to avoid further consideration by the Legislature.

41. Thus, the Republicans short-circuited the deliberative process. The passage of a plan containing two blatant and fundamental errors demonstrates how little deliberation occurred and shows that members voted on a bill the contents of which they cannot have understood. This is further underscored by the unwillingness of Republicans to open up the plan for further deliberation by correcting it through the ordinary legislative process. The Republicans passed the Plan because they had already agreed internally on that plan and felt no need for input from Democrats or from the public.

42. Indeed, the Republicans remained unwilling to consider alternative plans. Once the Democrats came to understand the interpretation of the 1999 Congressional Redistricting Act adopted by the 2001 Legislature, they introduced a plan in the Legislature that better meets even the reinterpreted criteria. Whereas 2001 PA itself states that the Republican Plan breaks eleven counties, see 2001 PA 115, § 4(e)(ii), the Defendant Intervenors have conceded that the Democrats introduced a redistricting plan in both the Michigan House and Senate on October 17, 2001 (the "Second Alternative Plan") that breaks only 10 counties under the 2001 PA 115's counting methodology. *See* Mich. Sup. Ct. Tr. at 29 (Jan.

23, 2001). In addition, the Defendant-Intervenors have stated that the Republicans' Plan breaks 14 cities or townships under 2001 PA 115's counting methodology, *see* Int. Br. at 61 (Mich. Sup. Ct. Jan 11, 2002), and that the Second Alternative Plan breaks only 12. *See* Mich. Sup. Ct. Tr. at 29 (Jan. 23, 2001).

43. Because the 1999 Act provided the Michigan Legislature until November 1, 2000 to enact a congressional redistricting plan, see Mich. Comp. Laws § 3.62, the Second Alternative Plan was introduced in the Legislature with sufficient time for its enactment. Nonetheless, the Republican leadership held it up in the House Committee on Redistricting and Elections and refused to allow a roll call vote on Democratic Vice Chair Nancy Quarles's motion to discharge the bill to the full House. The Republicans' extensive efforts to create, pass, and preserve the enactment of the Republican Plan despite its deviation from the nonpartisan redistricting criteria set forth in the 1999 Act is evidence of the partisan motivations underlying the Republican Plan.

44. Because the Republican Plan so clearly violates the 1999 Act, three Michigan voters who reside and vote in counties and municipalities that the Plan needlessly divides filed a challenge to the Plan in the Michigan Supreme Court in November 2001. There, the voters asked the court to declare 2001 PA 115 void and invalid (1) because it violates the 1999 Act by breaking more city, county, and municipal boundaries than is reasonably necessary, and (2) because Senate Secretary Viventi's changes to the bill caused Governor Engler to sign a bill on September 11, 2001 that differed from the bill that the Legislature passed on July 11, in violation of Article 4, sections 1 and 26 of the Michigan Constitution of 1963. The plaintiffs in the Michigan Supreme Court sought to enjoin the same officials who are Defendants here from holding elections under the Republican Plan and, pursuant to Mich. Comp. Laws § 3.74, asked the court to ensure the adoption

of a lawful congressional redistricting plan not later than April 1, 2002. After receiving briefs in the case, the court held oral argument on January 23, 2002. On March 25, 2002, a divided court held that the nonpartisan redistricting criteria set forth in the 1999 Act were not binding on the 2001 Michigan Legislature, and therefore ruled in favor of the defendant parties without resolving the question whether 2001 PA 115 violates them.

45. The fact remains, however, that the 2001 Legislature did violate those criteria. Regardless of whether those criteria were binding on the Legislature, the Legislature's willingness to disregard the criteria adopted by the 1999 Legislature – and even the reinterpreted criteria included in the 2001 legislation – underscores just how skewed the Republican Plan is.

46. In fact, Republicans repeatedly made clear in press reports that they intended to use their control of the state legislature and governorship to pass a redistricting plan aimed to benefit Republicans. That is what they did.

III. The Republican Plan Is Severely Biased Against Democrats

47. In general, Michigan is a politically competitive State that leans Democratic in federal elections. Michigan has voted for the Democratic candidate for President in each of the last three presidential contests, with the Republican candidate twice failing to capture even 40% of the statewide vote Both of its U.S. Senators are Democrats. At present, nine of Michigan's sixteen Representatives are Democrats.

48. The current makeup of Michigan's congressional delegation is not an artifact of any bias in the current congressional districting plan. The current districts were drawn in 1992 by a

federal district court of three judges – Sixth Circuit Judge Ryan and District Judges Newblatt and Bell. *See Good v. Austin*, 800 F. Supp. 551 (E.D. & W.D. Mich. 1992). In the most recent elections conducted under that plan, in November 2000, the Democratic congressional candidates received nearly 400,000 more votes than their Republican opponents (54.8% to 45.2% of the major-party vote) and that closely approximates the number of congressional seats they control (9 out of 16 seats is 56.3%).

49. The Michigan electorate has been trending Democratic in recent years. In 1996, Democrats carried the statewide congressional vote by seven percentage points (53.5% to 46.5%). In the 2000 elections, the margin was more than nine percentage points. In 1996 and 2000, the Democratic presidential candidates won by nearly five points more in Michigan than elsewhere in the country. In contrast, in 1984 and 1988, the Republican presidential candidates had won Michigan and had done so by larger margins than they did nationwide.

50. Despite the increasingly Democratic nature of the Michigan electorate in national elections, under the Republican Plan, Republicans are very likely to win nine or even ten of the fifteen congressional seats. This is apparent from analyzing the results of past elections based on the districts drawn in the Plan. Democratic presidential candidate Al Gore carried Michigan by approximately five points statewide. Thus, in a non-partisan redistricting plan, Al Gore would have carried slightly over half the congressional districts. Yet Republican presidential candidate George W. Bush carried ten of the fifteen congressional districts drawn in the Republican Plan. This is because the maximum number of Democrats were packed into just five districts – each of which Al Gore carried by at least 23 points. In contrast, under the court-drawn congressional districting plan put in place in 1992 ("the 1992 Plan"), Al Gore carried ten of sixteen congressional

districts, far more accurately reflecting the percentage of the statewide vote that he won.

51. Similarly, while Democratic senatorial candidate Debbie Stabenow won the U.S. Senate race in 2000 with just over half of the major-party statewide vote, she would have carried only five of the fifteen congressional districts under the Republican Plan – not surprisingly, the same five districts that Al Gore would have carried. In contrast, she would have carried nine out of sixteen districts under the 1992 Plan – a result consistent with her narrow victory statewide.

52. The partisan nature of the Republican Plan is also reflected in the pairing of current incumbents. While all seven Republican incumbents reside in separate districts under the Republican Plan, six of the nine Democratic incumbents are paired against each other. Congressman John Dingell of Dearborn and Congresswoman Lynn Rivers of Ann Arbor both reside in the new Fifteenth District. Congressman Dale Kildee of Flint and Congressman James Barcia of Bay City both reside in the new Fifth District. And Congressman David Bonior of Mount Clemens and Congressman Sander Levin of Royal Oak both reside in the new Twelfth District. (Congressman Bonior has announced his intention to retire from Congress and run for Governor.)

53. Thus, although there are currently nine Democratic incumbents and seven Republican incumbents, under the Republican Plan only six districts contain the homes of Democratic incumbents. Seven districts contain the home of Republican incumbents. Two districts (the Tenth and the Eleventh) contain the homes of no incumbents – an odd result in a State that is losing one congressional seat to reapportionment.

51. As a result of the packing of Democrats into five districts and the pairing of Democratic incumbents, the Republican Plan will result in the continued and systemic frustration of the will of a majority of the voters. The Republican Plan is so skewed in favor of Republican congressional candidates that it virtually ensures Republican control of the Michigan congressional delegation for the next decade. Based on analysis of 27 statewide election contests between 1994 and 2000, the Republican Plan creates 10 Republican-leaning seats and only 5 Democratic-leaning seats. Moreover, of the 10 Republican-leaning seats, 9 lean strongly Republican. Even if Democrats captured a mean of 55 percent of the statewide vote, they would likely capture only 40 percent of the seats (9 of 15). The substantial Republican advantage in these districts is likely to remain intact for the next decade, as the overall partisan leanings of the various districts is unlikely to change significantly.

54. Incumbency only strengthens the likelihood of continued Republican control. Of the 9 strongly Republican districts under the Republican Plan, 7 contain Republican incumbents, as the Republican Plan protects all current Republican incumbents. The other two strongly Republican districts have open seats. These districts were drawn for particular Republican candidates who have significant advantages in these districts.

55. The Republican Legislature took steps to ensure Republican control of Michigan's congressional delegation even after a new round of redistricting. The Legislature drew state legislative redistricting plans that, like the congressional plan, benefit Republicans. Although the state legislative plans are not as severely gerrymandered as the congressional plan and thus create a realistic possibility that Democrats will gain control of the Michigan House and/or Senate within the next decade, these plans nonetheless make it more difficult for Democrats to do so and thus

reduce the likelihood they will be in control during the next round of redistricting.

56. The impact of Republican control of the Michigan congressional delegation on Michigan Democrats will be substantial over the course of the next decade. Republican Representatives – especially those in the nine strongly Republican districts – will be indifferent to the dissenting views of Democratic constituents. Republican Members of the Michigan congressional delegation have far different voting records than Democratic Members. In general, a Michigan voter who votes for a Democratic Congressman is far less likely to be effectively represented by a Republican than a Democrat. The Republican Representative will be far less likely than a Democratic Representatives to press for and vote for legislation that is consistent with the views of the Democratic voter.

57. This is particularly true because 9 of the 15 Republican-leaning districts in the Republican Plan are non-competitive. Although Members of Congress from Michigan respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved, the actual voting behavior of Republican Members will not be significantly affected by the views of Democratic voters whom they know are not sufficiently numerous in their districts to threaten their reelection chances. Moreover, in non-competitive districts, Representatives will also be less response in the provision of constituent service than they would otherwise be.

58. The severely partisan nature of the Republican plan was entirely unnecessary. The three plans introduced by the Democrats in the Michigan Legislature pair fewer incumbents, more accurately reflect the political makeup of the State, and better

accord with the nonpartisan criteria set forth in the 1999 Congressional Redistricting Act. The First Alternative Plan, offered on the floor of the Michigan House as the Kilpatrick substitute, breaks only five county boundaries, far fewer than the ten boundaries broken in the Republican Plan. It also pairs only two incumbents. Democrat David Bonior, who plans to retire from Congress, is paired with Republican Joe Knollenberg in a Republican-leaning district. Finally, it accurately reflects the makeup of the State's electorate. Al Gore, who carried Michigan by roughly 5 percentage points, would have won 53.3% of the districts under this plan (in contrast to 33.3% under the Republican Plan). Nonetheless, on July 11, 2001, the House rejected this plan on a straight party-line vote (with the exception of a single Republican who joined Democrats in supporting the plan).

59. The Democrats also introduced another redistricting plan in July, the Democrats Other July Plan, that accords with the Republicans' bizarre reinterpretation of the 1999 Act. This plan breaks the same number of county boundaries as the Republican Plan using the Republicans' unique method of counting – or perhaps fewer depending on the precise meaning of the Republicans' method. This plan is not partisan, however. It pairs four incumbents – two Democrats in one district and two Republicans in another – in contrast to the six Democrats and zero Republicans paired in the Republican Plan. It also more accurately reflects the political makeup of the State. Al Gore would have carried 46.7% of the districts (7 out of 15) under this plan. The House also rejected this plan on a straight party-line vote.

60. The Democrats also introduce the Second Alternative Plan in October. This plan breaks fewer county and municipal boundaries than the Republican Plan even under the Republican interpretation. This plan is also not partisan. Although it pairs

four Republican incumbents in two districts, it creates two open seats that are Republican leaning. Indeed, 8 of 15 districts under this Plan lean Republican.

61. Thus, the Republicans rejected alternative plans and rammed through their own plan even though it deviated sharply from preexisting statutory criteria and required a significant revision of those criteria in violation of the Michigan Constitution. Clearly, partisan concerns predominated. As the Chairman of the House Redistricting and Election Committee Bruce Patterson explained to the *Detroit NEWS,* in April when asked if the Republicans intended to adopt a plan to create a 9-to-6 Republican majority, "If 9-6 is doable and within the rules, why wouldn't I go with that?" Mark Hornbeck & Charlie Cain, *Oakland Key to Redistricting*, DETROIT NEWS at A1, Wednesday, April 25, 2001. Indeed, the Republicans apparently believed that if 9-6, or 10-5, was "doable" they should go with that even if it was *not* within the rules.

CLAIM I

62. Plaintiffs incorporate by reference Paragraphs 1 through 50.

63. The facts herein alleged constitute a denial to plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Enter a declaratory judgment that the congressional districting plan that the Michigan Legislature enacted in July 2001 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution;

B. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from conducting primary, general, or special elections using the 2001 congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

C. Impose by Court order a new congressional redistricting plan that meets the requirements the United States Constitution and federal and state law;

D. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

E. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,

BODMAN, LONGLEY & DAHLING LLP

By: /s/ WILLIAM B. FORREST

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Dated: May 29, 2002

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH, Jr. Plaintiffs, v. CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER THOMAS, in his official capacity as Director of Elections for the State of Michigan, Defendants.	THREE-JUDGE COURT REQUESTED Civil Action No. 01-72584 Hon. Julian Abele Cook, Magistrate Judge Scheer

AMENDED COMPLAINT

1. The plaintiffs – Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith – have brought this action to enforce voting rights guaranteed to them by the United States Constitution and federal law. As registered Democrats in the State of Michigan, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative. The Michigan Legislature, however, has deliberately redrawn district lines to maximize the number of Republicans likely to be elected in the 2002 congressional elections. While political concerns always play some role in the redistricting process, such partisan gerrymandering, in which partisan concerns have predominated over other traditional redistricting principles, violates Article I's requirement that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the Several States," as well as the First, Fourteenth, and Fifteenth Amendments. The congressional redistricting plan also improperly dilutes the power and influence of African-American voters in violation of the Voting Rights Act.

PARTIES

2. Plaintiff Pat O'Lear resides in Sterling Heights city in Macomb County. His address is 8104 New Bradford, Sterling Heights, Michigan 48312. Prior to the 2001 redistricting, his home was in Michigan's Twelfth Congressional District. Under the 2001 plan, it is in Michigan's Tenth Congressional District.

3. Plaintiff Donald Rittering resides in Salem township in Washtenaw County. His address is 9706 Six Mile Road, Northville, Michigan 48167. Prior to the 2001 redistricting, his

home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, it is in the Seventh Congressional District.

4. Plaintiff Kay Ann Chase resides in Charlevoix township in Charlevoix County. Her address is 12492 Pine Ridge, Charlevoix, Michigan 49720. Prior to the 2001 redistricting, her home was in Michigan's First Congressional District. It remains in the First Congressional District under the 2001 plan.

5. Plaintiff Steve Borrello resides in Saginaw city in Saginaw County. His address is 721 South Michigan Avenue, Saginaw, Michigan 48602. Prior to the 2001 redistricting, his home was in Michigan's Fifth Congressional District. It remains in the Fifth Congressional District under the 2001 plan.

6. Plaintiff Lawrence Kestenbaum resides in Ann Arbor city in Washtenaw County. His address is 1726 W. Stadium Boulevard, Ann Arbor, Michigan 48103. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Fifteenth Congressional District.

7. Plaintiff James Larkin resides in Garden City in Wayne County. His address is 1021 West Rose, Garden City, Michigan 48185. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Eleventh Congressional District.

8. Plaintiff Christopher Smith resides in Lincoln Park city in Wayne County. His address is 950 Moran, Lincoln Park, Michigan 48146. Prior to the 2001 redistricting, his home was in Michigan's Sixteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

9. Plaintiff Barbara Long resides in Detroit city in Wayne County. Her address is 11730 Rosemont, Detroit, Michigan 48228. Prior to the 2001 redistricting, her home was in Michigan's Fourteenth Congressional District. Under the 2001 plan, her home is in Michigan's Fourteenth Congressional District.

10. Plaintiff George Gaines resides in Detroit city in Wayne County. His address is 1531 Chateaufort, Detroit, Michigan 48207. Prior to the 2001 redistricting, his home was in Michigan's Fifteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

11. Plaintiff Minnie H. Whiting resides in Pontiac city in Oakland County. Her address is 137 E. Iroquois, Pontiac, Michigan 48341. Prior to the 2001 redistricting, her home was in Michigan's Ninth Congressional District. Under the 2001 plan, her home is in Michigan's Ninth Congressional District.

12. Defendants are Candice S. Miller, the Secretary of State for the State of Michigan, and Christopher Thomas, the Director of Elections for the State of Michigan. Both defendants are sued in their official capacities.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202 and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

BASIS OF CLAIMS

14. On July 11, 2001, on a straight party-line vote in the Michigan Senate and an almost straight party-line vote in the Michigan House of Representatives, the Republican majorities in

Michigan's legislative chambers passed a congressional redistricting plan ("the Republican Plan") that will radically alter the partisan balance of Michigan's congressional delegation. At present, Michigan has nine Democratic and seven Republican Representatives in Congress. Under the new plan, Michigan is likely to have only five or six Democratic Representatives and nine or ten Republican Representatives. (As a result of the 2000 census, Michigan is now entitled to only fifteen congressional seats). Thus, based entirely on redrawing of district lines, the number of Democratic Representatives is likely to decrease by at least one-third.

15. In passing the Republican Plan, the Republicans deviated from the nonpartisan criteria they themselves had helped to establish when they passed the Congressional Redistricting Act of 1999, P.A. 221. Because they could not achieve their desired partisan ends consistent with these criteria, the Republicans "reinterpreted" these criteria in the legislation that included the Republican Plan. This "reinterpretation" violated the Michigan Constitution's mandate that no Act shall take effect immediately unless passed by a two-thirds vote of each house. Mich. Const. art. 4, § 27 ("No Act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."). It also violated the rule against amendment by reference ("No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Mich. Const. art. 4, § 25) and the "two subject rule" ("No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Mich. Const. art. 4, § 24). The Legislature's

willingness to violate the Michigan Constitution underscores the extent to which the Republican Plan was based on partisan considerations.

16. In 1999, the Republicans controlled both houses of the Michigan Legislature, as well as the governorship. As will be set forth below, however, the Republicans understood that Michigan was becoming increasingly Democratic and thus there was a significant chance that Democrats would control at least one legislative chamber at the time of redistricting in 2001. They therefore passed the Congressional Redistricting Act to limit the role of partisan considerations in redistricting. The Act established very specific criteria for congressional redistricting in addition to compliance with federal law. It prioritized those criteria and placed at the top of the priority list that "[e]ach congressional district shall consist of areas of convenient territory contiguous by land," and, after contiguity, that "[c]ongressional district lines shall break as few county boundaries as is reasonably possible." Mich. Comp. Laws § 3.63(c). The Act also provided, further down the priority list, that "[c]ongressional district lines shall break as few city and township boundaries as is reasonably possible." *Id.* The complete text of the statute is attached as Ex. A.

17. The Republican Plan violates these criteria by breaking ten county boundaries and fourteen city or township boundaries when it is "reasonably possible" to draw an alternative redistricting plan that breaks only five county boundaries and ten city or township boundaries. During the legislative session, Democrats introduced a plan that breaks only five county boundaries and ten city or county boundaries. This plan also does not pair in the same district any incumbents seeking reelection and more accurately reflects the political makeup of the State. (One Democratic incumbent intends to run for Governor, so only fifteen incumbents

– eight Democrats and seven Republicans – are seeking reelection.) Nonetheless, this alternative plan was defeated on the floor of the House on July 11, 2001, on a party-line vote (with the exception of one Republican who joined Democrats in supporting the plan).

18. In 1999, when the Legislature passed the Congressional Redistricting Act, it believed that this Act would bind the 2001 Legislature that would control redistricting. As explained above, the Michigan Constitution forbids implementation of legislation until 90 days after conclusion of a legislative session, in the absence of a two-thirds vote. Thus, without a two-thirds vote, the 2001 Legislature could not change the 1999 criteria for enacting a redistricting plan and immediately use those criteria as the basis for enacting a new redistricting plan. Even if the Legislature changed the criteria, the 1999 criteria would apply to 2001 redistricting efforts.

19. Nonetheless, because the Republican Plan clearly violates the statutory criteria set forth in the Congressional Redistricting Act, the 2001 Legislature redefined those criteria under the guise of interpretation. The legislation that includes the Republican Plan first states that "[i]t is the intention of the Legislature to comply fully with section 3 of the Congressional Redistricting Act, 1999 P.A. 221, MCL 3.63," which requires congressional district lines to break as few county boundaries (and as few city or township boundaries) as possible. But it then defines the number of county breaks in the redistricting plan as follows:

> (i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.

(ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.

(iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

To the extent they are comprehensible, these provisions appear to have been designed to justify the Republican Plan and thus must have been intended to govern the enactment of that very Plan. In other words, they were intended to have immediate effect. But the Republicans knew that they did not have the two-thirds majority needed for immediate implementation of the new criteria, and indeed, a Senate vote on whether the legislation should have immediate effect failed to garner the necessary two-thirds vote. The Republicans therefore attempted to circumvent the constitutional requirement for such a two-thirds vote by labeling the new statutory criteria as merely an "interpretation" of existing criteria. Yet the new provisions do not merely interpret the 1999 Act's redistricting criteria; they completely change them and thus required a two-thirds vote that they did not receive. The new redistricting criteria were therefore not in effect when the Republicans enacted the Republican Plan. The 1999 criteria were controlling.

20. The Republicans' willingness to deviate from the nonpartisan redistricting criteria they enacted in 1999 and to circumvent the Michigan Constitution in the process demonstrate that partisanship was the dominant motivation for the Republican Plan. This is also shown by the Republicans' willingness to violate the constitution in other ways. Passage of new redistricting criteria in the same legislation as a redistricting plan, without re-

publication of existing redistricting criteria, violates Michigan's constitutional rules against amendment by reference and inclusion of two subjects in the same law.

21. The partisan motivation for the Republican Plan is further emphasized by the manner in which that plan was shepherded through the Legislature with little opportunity for evaluation or for presentation of alternative plans. When the Michigan Legislature passed the Congressional Redistricting Act in 1999, it understood the importance of careful deliberation and public input during the redistricting process. It therefore provided that the Legislature "shall enact a redistricting plan for congressional districts" "[n]ot later than *November 1, 2001*." Mich. Comp. Laws § 3.62 (emphasis added). The November 1, 2001 deadline allowed seven months for careful deliberation after receipt of the 2000 census data (which, by federal law, must take place by April 1), while still ensuring that any courts reviewing the redistricting plan would have sufficient time to consider that plan and devise an alternative, if necessary, before the 2002 congressional election cycle gets underway.

22. Michigan law further emphasizes the importance of deliberation and public input in the redistricting process by building in a public comment period during the state judicial phase of the redistricting process. In particular, the law provides that in the event the Legislature is unable to agree on a redistricting plan, the Michigan Supreme Court shall propose a plan for public consideration and "make that plan available for public inspection at least 30 days before the time set for [a] hearing." Mich. Comp. Laws § 3.74.

23. Federal law also requires a deliberative process. The Voting Rights Act of 1965 prohibits enactment of any redistricting plan that would abridge the right to vote based on race or ethnicity.

In reviewing a Michigan redistricting plan under the Voting Rights Act, the Justice Department (or the District Court for the District of Columbia) will consider the "extent to which the [Michigan Legislature] followed objective guidelines and fair and conventional procedures" in enacting the new map, the "extent to which the [Legislature] afforded members of racial and language minority groups an opportunity to participate" in the decision-making process, and the "extent to which the [Legislature] took the concerns of members of racial and language minority groups into account." 28 C.F.R. § 51.57. A process that departs from normal legislative procedures and excludes African-Americans and other minorities from full participation risks rejection by the Justice Department or D.C. District Court.

24. Initially, the Republicans appeared to understand the value that Michigan and federal law places on deliberation and public participation in the redistricting process. When the census data were released in March 2001, the Republican leadership of the Michigan Legislature announced a "framework for redistricting" that included "public hearings across Michigan this summer, with the goal of passing a redistricting plan in the fall." Press Release from the Office of Senate Majority leader Dan L. DeGrow, "Michigan 2000 Census Figures Released: New Legislative Districts to be Developed" (Mar. 28, 2001) (quoting Sen. DeGrow and Sen. Schuette). This schedule provided sufficient time for presentation of alternative plans and reasoned consideration of these plans while nonetheless ensuring that a redistricting plan could be adopted by the Legislature and upheld by the courts well before the congressional candidates would have to file for the 2002 congressional elections.

25. The Republican leadership later abandoned its proposal for a deliberative process, and instead announced on Friday, June 8, that "organizations and/or interested persons have until noon,

Monday, June 18 to submit prepared plans, voting data, or legal analyses relevant to legislative and congressional redistricting." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Legislative Redistricting Input Sought" (June 8, 2001) (quoting Sen. DeGrow and Sen. Schuette). The Senate Majority leadership later granted a one-week extension – until noon on June 25 – for submission of plans. Even with this additional week, there was still very little time for interested parties to engage in the complicated process of drawing maps and ensuring that they complied with all of the necessary legal requirements.

26. Not only did the Republican leadership provide little time for submission of alternative redistricting plans, it provided others little time for consideration of its own plan. When the Republicans first introduced a redistricting bill, on June 14, 2001, they introduced a shell bill that eliminated old congressional-district lines without proposing any new districts. *See* Senate Bill 546 (as introduced, June 14, 2001). The bill was referred to the Committee on Reapportionment that same day.

27. The Republicans did not publicly release the Republican Plan until 1:00 p.m. on June 25, 2001 – *after* the artificial deadline established by the Senate Majority leadership for introduction of plans had expired. The Republicans introduced the plan on the afternoon of June 25 even though the map was likely available far earlier. The Republican staff person who drew the map testified to the Senate Reapportionment Committee that she did so before political data were loaded onto the State's redistricting computers. Since these data were loaded in April 2001, her testimony suggests that she drew the map at least two months before it was publicly released.

28. On June 25, the Senate Committee on Reapportionment held the first and only hearing at which it discussed specific

congressional maps, and it was at this hearing that the Republicans introduced the Republican Plan. The Committee ensured there would be little public participation at this hearing by waiting until the afternoon of Friday June 22 to call the hearing. As a result, the only public participant at the hearing was the Executive Director of the Detroit Chapter of the National Association for the Advancement of Colored People ("NAACP").

29. The Republicans further limited public participation – and analysis of the Republican Plan by the public or by Democrats – through the manner in which they presented the bill. The bill did not include a pictorial representation of the proposed districts. Instead, the bill consisted of a list of counties, cities, and or townships in each district. When only part of a city or township was included in a district, the bill designated the included areas based on the six-digit census-tract numbers and four-digit census-block numbers of those areas. The bill was 167 pages long. Thus, the exact boundaries of each district could only be determined by analyzing thousands of census tract and block numbers – a task that is virtually impossible without a computer.

30. The Senate Republicans refused to provide the proposed map in electronic form even after they were asked to do so. Thus, before the map could be analyzed, the thousands of block numbers had to be manually entered into a computer. Not surprisingly, the Republicans' desire to preclude Democrats and the public from readily analyzing the Republican Plan, and their resultant unwillingness to provide the map in electronic form, resulted in a major mistake that was not discovered until after both the Senate and House had already passed the Plan, as is set forth below. In other states, it is routine practice for maps to be provided in electronic form to legislators from both political parties – and even to be placed on the World Wide Web for public inspection.

31. The NAACP asked for a 30-day extension to evaluate the map. This request was rejected.

32. The Committee voted in favor of the plan on June 25, 2001, and the full Senate voted to pass the proposed plan on June 26, 2001. Thus, the Senate passed the Republican Plan only a day after it was first introduced. Both in committee and on the floor, votes divided perfectly along party lines, with Republicans voting in favor and Democrats in opposition.

33. The bill moved to the House, where the Committee on Redistricting and Elections met on July 10, 2001, to consider the Senate plan. The House had only one day to consider the plan and reach an agreement with the Senate, as the legislative session was scheduled to end on July 11, 2001. Committee hearings and floor debate were minimal. The Committee heard limited testimony at its July 10 hearing, all of it in opposition to the Republican Plan, but it summarily ignored this testimony. The Committee Chair also summarily dismissed the questions of Democratic committee members on the plan, by either indicating that he did not know the answers to the questions or stating that the members should obtain the answers from Democratic staff. At roughly 11:00 p.m. on July 10, the Committee voted to approve the Republican Plan on a straight-party line vote.

34. The full House considered the Republican Plan well after midnight on the morning of July 11, 2001 – not a time when public scrutiny or rigorous debate was likely to occur. At roughly 2:35 a.m., the House passed the plan on a straight party-line vote (with the exception of one Republican who joined the Democrats because the Republican Plan diluted the political influence of Dearborn's growing Arab-American population) after first rejecting two Democratic alternatives (with the same Republican again the only Representative to break party lines).

35. Later on July 11, the House asked the Senate to return the redistricting bill because it contained a blatant error. The Fifteenth Congressional District was noncontiguous: To traverse it, one would have to leave the Fifteenth and enter the Seventh Congressional District. Thus, the plan passed by both houses violated the *highest*-priority state criterion under the 1999 Congressional Redistricting Act. Democrats and members of the public did not catch the error prior to passage because the Republicans rushed the bill through the Legislature and refused to provide an electronic version of their map. Republicans did not catch the error because they were concerned predominantly with the partisan implications of the Republican Plan and apparently never even analyzed the Plan carefully to determine its compliance with the 1999 Act.

36. When the bill containing the Republican plan was returned to it on July 11, the House amended the bill to make the Fifteenth District contiguous, again passed the bill along party lines (with the same lone Republican dissenter) and returned it to the Senate. The Senate then passed the amended bill, again dividing perfectly along party lines.

37. The bill contained another blatant error, however. Four thousand people were not placed into *any* district in the bill. Thus, the bill plainly violated the principle of one person, one vote. (The state legislative redistricting plan contained a similar but lesser error – one unpopulated census tract was not placed in any district). Once again, no legislators caught this error because of the rush to enact the Republican Plan. By the time this error became apparent, the Legislature was out of session and was not scheduled to return until September.

38. Senate Secretary Carol Viventi was therefore faced with a choice: presenting the Republican Plan to the Governor despite the

blatant error, correcting the error herself, or waiting until the Legislature returned in September and sending the bill back to the Legislature for amendment. Sending the bill back to the Legislature, however, would have opened up the possibility of further debate on the Republican Plan. The Republican leadership and Governor Engler did not wish to open up any such possibility.

39. After a series of meetings with Republican leaders, Secretary Viventi concluded that she had the authority to correct the Republican Plan herself under Joint Rule 12 . That rule states that, "[i]f errors are found in a bill which has been passed by both Houses, the House in which the bill originated may make amendments to correct the errors and shall notify the other House of its action. If the corrective amendments are agreed to by the other House, the corrected bill shall be referred for enrollment printing and presentation to the Governor." Secretary Viventi apparently concluded that this Rule gave her authority to add four thousand people to a congressional district without the approval of either House because the correction was merely "technical" in nature. (In contrast, the Clerk of the House, who controlled presentment of the state legislative redistricting plan to the Governor, apparently concluded that Rule 12 did not provide him authority to correct the similar – but lesser – problem with the state legislative redistricting plan and did not correct that plan.)

40. On September 6, nearly two months after passage of the Republican Plan, Secretary Viventi corrected the Plan and presented it to the Governor. The Governor signed the bill containing the Republican Plan on September 11, 2001. If Secretary Viventi had waited only a couple more weeks, she could have returned the bill to the Legislature to correct the Plan itself.

41. Thus, the Republicans short-circuited the deliberative process. The passage of a plan containing two blatant and

fundamental errors demonstrates how little deliberation occurred and shows that members voted on a bill the contents of which they cannot have understood. This is further underscored by the unwillingness of Republicans to open up the plan for further deliberation by correcting it through the ordinary legislative process. The Republicans passed the Plan because they had already agreed internally on that plan and felt no need for input from Democrats or from the public. In fact, Republicans repeatedly made clear in press reports that they intended to use their control of the state legislature and governorship to pass a redistricting plan aimed to benefit Republicans. That is what they did.

42. Similarly, while Democratic senatorial candidate Debbie Stabenow won the U.S. Senate race in 2000 with just over half of the major-party statewide vote, she would have carried only five of the fifteen congressional districts under the Republican Plan – not surprisingly, the same five districts that Al Gore would have carried. In contrast, she would have carried nine out of sixteen districts under the 1992 Plan – a result consistent with her narrow victory statewide.

43. The partisan nature of the Republican Plan is also reflected in the pairing of current incumbents. While all seven Republican incumbents reside in separate districts under the Republican Plan, six of the nine Democratic incumbents are paired against each other. Congressman John Dingell of Dearborn and Congresswoman Lynn Rivers of Ann Arbor both reside in the new Fifteenth District. Congressman Dale Kildee of Flint and Congressman James Barcia of Bay City both reside in the new Fifth District. And Congressman David Bonior of Mount Clemens and Congressman Sander Levin of Royal Oak both reside in the new Twelfth District. (Congressman Bonior has announced his intention to retire from Congress and run for Governor.)

44. Thus, although there are currently nine Democratic incumbents and seven Republican incumbents, under the Republican Plan only six districts contain the homes of Democratic incumbents. Seven districts contain the home of Republican incumbents. Two districts (the Tenth and the Eleventh) contain the homes of no incumbents – an odd result in a State that is losing one congressional seat to reapportionment.

45. In contrast, two nonpartisan plans introduced by the Democrats in the Michigan Legislature pair fewer incumbents, more accurately reflect the political makeup of the State, and better accord with the nonpartisan criteria set forth in the 1999 Congressional Redistricting Act. The first plan, offered on the floor of the Michigan House as the Kilpatrick substitute, breaks only five county boundaries, far fewer than the ten boundaries broken in the Republican Plan. It also pairs only two incumbents. Democrat David Bonior, who plans to retire from Congress, is paired with Republican Joe Knollenberg in a Republican-leaning district. Finally, it accurately reflects the makeup of the State's electorate. Al Gore, who carried Michigan by roughly 5 percentage points, would have won 53.3% of the districts under this plan (in contrast to 33.3% under the Republican Plan). Nonetheless, on July 11, 2001, the House rejected this plan on a straight party-line vote (with the exception of a single Republican who joined Democrats in supporting the plan).

46. The Democrats introduced a second redistricting plan that accords with the Republicans' bizarre reinterpretation of the 1999 Act. This plan breaks the same number of county boundaries as the Republican Plan, using the Republicans' unique method of counting. This plan is not partisan, however. It pairs four incumbents – two Democrats in one district and two Republicans in another – in contrast to the six Democrats and zero Republicans

paired in the Republican Plan. It also more accurately reflects the political makeup of the State. Al Gore would have carried 46.7% of the districts (7 out of 15) under this plan. The House also rejected this plan on a straight party-line vote.

47. Thus, the Republicans rejected alternative plans and rammed through their own plan even though it deviated sharply from preexisting statutory criteria and required a significant revision of those criteria in violation of the Michigan Constitution. Clearly, partisan concerns predominated. As the Chairman of the House Redistricting and Election Committee Bruce Patterson explained to the *Detroit NEWS,* in April when asked if the Republicans intended to adopt a plan to create a 9-to-6 Republican majority, "If 9-6 is doable and within the rules, why wouldn't I go with that?" Mark Hornbeck & Charlie Cain, *Oakland Key to Redistricting*, DETROIT NEWS at A1, Wednesday, April 25, 2001. Indeed, the Republicans apparently believed that if 9-6, or 10-5, was "doable" they should go with that even if it was *not* within the rules.

48. In addition to its excessive partisanship, the Republican Plan also limits the power and influence of Michigan one million four hundred twelve thousand African-American citizens. Outside of Wayne County, blacks in Michigan would not reside in a majority-black district under any redistricting plan but they could still have significant impact on congressional elections. However, because blacks in Michigan tend to vote as a bloc and strongly favor Democrats and because whites in Michigan tend to vote as a bloc, blacks can only have significant impact on the nomination and election of a congressman or congresswoman if (1) they reside in a competitive or Democratic-leaning district, and (2) there is a relatively high concentration of blacks among Democratic primary voters.

49. Outside of Detroit, three of the cities with the highest number of blacks are Pontiac, Grand Rapids, and Lansing. Under the Republican Plan, each of these cities is placed in a strongly Republican district and also is isolated from other cities with a significant black population. Under the Democrats' plan, however, each of these three cities is placed in a competitive or Democratic-leaning district.

50. Finally, because blacks in Michigan vote overwhelmingly for Democrats in congressional elections, the substantial diminution in Democratic strength under the Republican Plan inherently dilutes the ability of black voters to participate in the political process and to elect candidates of their choice to Congress.

CLAIM I

51. Plaintiffs incorporate by reference Paragraphs 1 through 50.

52. The facts herein alleged constitute a denial or abridgement of each plaintiff's right to vote for his or her Representative to the United States Congress, in violation of Sections 2 and 4 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment.

CLAIM II

53. Plaintiffs incorporate by reference Paragraphs 1 through 50.

54. The facts herein alleged constitute a denial of the plaintiffs' freedoms of speech and association in violation of the First Amendment to the United States Constitution.

CLAIM III

55. Plaintiffs incorporate by reference Paragraphs 1 through 50.

56. The facts herein alleged constitute a denial to plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM IV

57. Plaintiffs incorporate by reference Paragraphs 1 through 50.

58. The facts herein alleged constitute an abridgment of the privileges and immunities of citizenship guaranteed to plaintiffs by the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM V

59. Plaintiffs incorporate by reference Paragraphs 1 through 50.

60. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed to them by Section 1 of the Fifteenth Amendment to the United States Constitution.

CLAIM VI

61. Plaintiffs incorporate by reference Paragraphs 1 through 50.

62. The facts herein alleged constitute a deprivation of plaintiffs' constitutional rights that is actionable under Section 1983 of Title 42 of the United States Code.

Claim VII

63. Plaintiffs incorporate by reference Paragraphs 1 through 50.

64. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed them by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Assume jurisdiction of this matter and convene as a three-judge District Court pursuant to Section 2284 of Title 28 of the United States Code;

B. Set a deadline of April 1, 2002, pursuant to the principles of federalism and comity set forth in *Growe v. Emison*, 507 U.S. 25, 32-37 (1993), and consistent with the April 1, 2002, deadline established by Michigan law, Mich. Comp. Laws § 3.74(g), for the Michigan Supreme Court to adjudicate any challenges to the Michigan congressional redistricting plan.

C. If the Supreme Court of Michigan fails to adopt a new, legally valid congressional redistricting plan by that April 1, 2002 deadline, enter a declaratory judgment that the congressional districting plan that the Michigan Legislature enacted in July 2001 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

D. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from conducting primary, general, or special elections using the 2001 congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

E. Impose by Court order a new congressional redistricting plan that meets the requirements the United States Constitution and federal and state law;

F. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

G. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,
BODMAN, LONGLEY & DAHLING LLP
By: /s/ WILLIAM B. FORREST

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APPENDIX F

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 3. FEDERAL AND INTERSTATE RELATIONS
CONGRESSIONAL REDISTRICTING ACT

3.63. Guidelines and priorities; enactment of redistricting plans

Sec. 3. Except as otherwise required by federal law for congressional districts in this state, the redistricting plan shall be enacted using only these guidelines in the following order of priority:

(a) The constitutional guideline is that each congressional district shall achieve precise mathematical equality of population in each district.

(b) The federal statutory guidelines in no order of priority are as follows:

(i) Each congressional district shall be entitled to elect a single member.

(ii) Each congressional district shall not violate section 2 of title I of the voting rights act of 1965, Public Law 89-110, 42 U.S.C. 1973.

(c) The secondary guidelines in order of priority are as follows:

(i) Each congressional district shall consist of areas of convenient territory contiguous by land. Areas that meet only at points of adjoining corners are not contiguous.

(ii) Congressional district lines shall break as few county boundaries as is reasonably possible.

(iii) If it is necessary to break county lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(iv) Congressional district lines shall break as few city and township boundaries as is reasonably possible.

(v) If it is necessary to break city or township lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(vi) Within a city or township to which there is apportioned more than 1 congressional district, district lines shall be drawn to achieve the maximum compactness possible.

(vii) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.

(viii) If a discontiguous township island exists within an incorporated city or discontiguous portions of townships are split by an incorporated city, the splitting of the township shall not be considered a split if any of the following circumstances exist:

(A) The city must be split to achieve equality of population between congressional districts as provided in

subdivision (a) and it is practicable to keep the township together within 1 district.

(B) A township island is contained within a whole city and a split of the city would be required to keep the township intact.

(C) The discontiguous portion of a township cannot be included in the same district with another portion of the same township without creating a noncontiguous district.

(ix) Each congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state.

APPENDIX G

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 3. FEDERAL AND INTERSTATE RELATIONS
CONGRESSIONAL APPORTIONMENT

3.54. Redistricting plan guidelines, priorities, purposes

Sec. 4. All of the following apply to the redistricting plan in section 1:

(a) In adopting the redistricting plan for congressional districts, it is the intention of the legislature to comply fully with section 3 of the congressional redistricting act, 1999 PA 221, MCL 3.63.

(b) The number of county breaks in the redistricting plan is determined by the following principles:

(i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.

(ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.

(iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

(c) The redistricting plan was designed to comply fully with both section 2 of the voting rights act of 1965, Public Law 89-110, 42 U.S.C. 1973, and the requirements of the equal protection clause

of amendment XIV of the constitution of the United States, as set forth in Shaw v Reno, 509 US 630 (1993), and subsequent cases concerning racial gerrymandering. In light of these dual obligations, the plan avoids any practice or district lines that result in the denial of any racial or ethnic group's equal opportunity to elect a representative of its choice and, at the same time, does not subordinate traditional redistricting principles for the purpose of accomplishing a racial gerrymander or creating a majority-minority district. As a consequence, the plan does not result in retrogression or dilution of minority voting strength, particularly in light of the demographic limitations caused by relative population losses and the neutral criteria set forth in section 3 of the congressional redistricting act, 1999 PA 221, MCL 3.63. However, the plan does not sacrifice traditional neutral principles, such as, most importantly, preservation of county and municipal boundaries, for the purpose of engaging in a gerrymander that unnecessarily favors 1 racial group over others.

(d) The plan furthers the underlying purpose of the state constitution of 1963 by facilitating effective representation in the legislature where elected representatives can advance the shared interests of unified municipalities or counties. It does so without sacrificing voting rights act of 1965 principles, equal electoral opportunities, or racial fairness.

(e) The redistricting plan for congressional districts consists of 15 single member districts comprised of convenient territories contiguous by land. All of the following apply to the plan:

(i) The population in each of districts 1-9 and 11-15 is 662,563. The population of district 10 is 662,562.

(ii) The number of breaks in county boundaries is 11.

(iii) The number of breaks in city and township lines is 14.

(iv) No congressional district is wholly contained within a city.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

ORDER

On April 18, 2002, the Defendants, Candice S. Miller, Secretary of State for the State of Michigan, and Christopher M. Thomas, Director of the Bureau of Elections, filed a motion in which they seek reconsideration of the Order of the Court on April 24, 2002, which *inter alia*, (1) extended the date for filing and processing the nominating petitions of potential candidates for the United States House of Representatives for the 2002 primary election from May 14, 2002 to June 11, 2002, and (2) set forth an expedited discovery and trial schedule. The Plaintiffs, Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borrello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith, oppose this request.

The Local Rules of the Eastern District of Michigan, which set forth the standards to be applied by the Court when attempting to resolve motions for reconsideration, provide, in part, that the movant must (1) demonstrate a palpable defect by which the court and the parties have been misled and (2) show that a correction of the defect would result in a different disposition of the case. E.D. Mich. LR 7.1(g)(3).

In maintaining that a palpable defect exists in this challenged decision of April 24th to postpone the filing deadline and expedite the trial schedule, the Defendants submit that the Plaintiffs have failed to establish that they (1) are likely to succeed on the merits of their claims which challenge the validity of the 2001 Congressional Districting Plan, 2001 PA 115, and (2) will sustain an irreparable harm in the absence of some form of injunctive relief. (Defs.' Mem. Supp. Reconsideration at 18-25). Against these assertions, the Plaintiffs argue that the decision to postpone the May 14th filing deadline was reasonable in light of the complex issues in the instant action. Moreover, they maintain that, in the event that the Court decides to grant the Defendants' request, such a decision would be justified only if, upon a finding

that the redistricting scheme was unconstitutional, the Court immediately adopted a new remedial scheme at the conclusion of this trial. (Pls.' Opp. at 11).

It is well-settled in this Circuit that a court must consider four factors when deciding whether to issue a preliminary injunction. Namely, whether (1) the plaintiffs' have demonstrated a likelihood of success on the merits; (2) the granting of the injunction will prevent an irreparable injury; (3) the issuance of the injunction will harm others; and (4) the public interest will be served by the grant of injunctive relief. *Michigan Coalition of Radioactive Material Users v. Griepentrog,* 945 F.2d 150, 154 (6th Cir. 1991).

As an initial matter, the Defendants are correct in their assertion that the Court did not outline the reasons underlying its decision to postpone the May 14th filing deadline with any specificity. However, the Court is satisfied that its ultimate decision of April 24th relating to the postponement was correct under the existing circumstances. Specifically, the Court finds that (1) the Plaintiffs' allegations, as set forth in the pleadings, arguably support a finding at the early-stage of this litigation that they have a likelihood of success on the merits of their claim, or a portion thereof, of unconstitutional political gerrymandering, (2) the granting of injunctive relief will prevent an irreparable injury that would likely result if a potentially unconstitutional election is allowed to proceed unfettered, and (3) the collective interests of the parties and the public will be served by the brief postponement of an extension of the challenged filing date to June 11th in order to assure the preservation of the electoral process.

Thus, having reviewed the Defendants' motion, as well as the current record in the above- titled action, the Court is persuaded that its decision to postpone the May 14th deadline for

filing the nominating petitions of potential congressional candidates in the forthcoming primary elections until June 11, 2002, was the least intrusive means of ensuring fairness in the process, while simultaneously affording the Court with a full opportunity to resolve all of the contested issues in this case prior to the August 2002 election. Furthermore, the Court finds that granting the Defendants' requested relief would result in further harm to the State's electorate and unnecessary confusion.

Accordingly, the Court will deny the Defendants' motion for reconsideration for the reasons that have been set forth above.

IT IS SO ORDERED.

FOR AND ON BEHALF OF THE PANEL

/s/ DAVID M. LAWSON

DAVID M. LAWSON
United States District Judge

Dated: May 15, 2002

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants,

and

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Defendant-Intervenors.

Case No. 01-72584
Honorable Boyce F. Martin, Jr.
Honorable Julian Abele Cook, Jr.
Honorable David M. Lawson

NOTICE

On behalf of the three judge panel hearing in this case, please be advised that the hearing in this matter scheduled for Tuesday, May 21, 2002 at 1:00 p.m. has been cancelled;

The Panel also advises that decisions on the pending Motions to Dismiss in this matter will be issued on or before Friday, May 24, 2002.

For and on Behalf of the Panel:

/s/ DAVID J. WEAVER
David J. Weaver
Court Administrator/Clerk of Court

Dated: May 15, 2002

APPENDIX J

MICHIGAN SUPREME COURT

JANUARY 23, 2002

DAVID LEROUX, MICHAEL GRAY and ROBERT L. ELLIS,
Plaintiffs,

v

CANDICE S. MILLER, in her official capacity a Secretary of State for the State of Michigan, and CHRISTOPHER M. THOMAS, in his official capacity as Director of Elections for the State of Michigan,
Defendants,

SUZANNE L. ANDERSON, SHARON YENTSCH, and BRADLEY VAN HAITSMA,
Intervening Respondents.

Case Number 120338

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* * *

JUSTICE CORRIGAN: I have one follow-up question for you that came up in our previous study of this case.

The plaintiffs have claimed that their second alternative plan that the Democrats had introduced had 10 county breaks and 12 municipal breaks under the 2000 statutory definitions. I'm wondering if you accept that – what the intervenor's view of the second alternative plan is.

MR. ELLSWORTH: There is some disagreement among our clients with respect to the number of county breaks in that plan. I believe that it is a 10-break plan, and I believe that the 10-break figure [for county boundaries] and the 12-break figure [for municipal boundaries] is correct. . . .

Supreme Court, U.S.
FILED
SEP 27 2002
OFFICE OF THE CLERK

No. 02-200

In the Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING AND CHRISTOPHER SMITH,

Appellants,

v

CANDICE S. MILLER, CHRISTOPHER M.THOMAS, THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, AND JAMES L. PALASKE,

Appellees.

STATE APPELLEES', MICHIGAN SECRETARY OF STATE CANDICE MILLER AND DIRECTOR OF ELECTIONS CHRISTOPHER THOMAS, MOTION TO DISMISS OR AFFIRM

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32 pp

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 USC §1253 to review a grant of summary disposition, upholding the constitutionality of Michigan's 2001 Congressional Districting Plan, which is not an "order granting or denying . . . an interlocutory or permanent injunction."

2. Whether Appellants' allegation that the 2001 Congressional Districting Plan will deny them proportional representation fails to state an actionable claim of unconstitutional partisan gerrymandering because this Court in *Davis v Bandemer*, 478 US 109 (1986) clearly held that the Equal Protection Clause of the Fourteenth Amendment does not entitle political parties to proportional representation.

3. Whether Appellants otherwise fail to state an actionable claim of unconstitutional partisan gerrymandering under the Equal Protection Clause where they have not alleged facts that establish that the 2001 Congressional Districting Plan will subject them to an unconstitutional discriminatory effect, but instead have pleaded facts that preclude them from making that requisite showing.

4. Whether Appellants' argument to extend the lower standard for racial gerrymandering claims articulated in *Shaw v Reno*, 509 US 630 (1993) (*Shaw I*) to partisan gerrymandering claims disconnects that ruling from its factual and legal foundation and thus was properly dismissed by the District Court.

5. Whether Appellants' US Const, art 1, § 4 claim represents a fundamental misconstruction of the Elections Clause, the dismissal of which should be summarily affirmed by this Court.

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I. Appellants do not have a direct appeal to this Court from the District Court's decision granting summary disposition to the joint defendants, as that decision is not an order granting or denying injunctive relief. Thus, this Court does not have jurisdiction under 28 USC § 1253 8

II. Appellants do not state an actionable partisan gerrymandering claim under the Equal Protection Clause and the District Court's dismissal of that claim should be summarily affirmed. 11

A. In *Bandemer* this Court rejected the notion that the Equal Protection Clause entitles voters to proportional representation. The District Court properly dismissed Appellant's partisan gerrymandering equal protection claim because it is, at core, an allegation of disproportionate representation. 11

B. Appellants do not otherwise allege an actual discriminatory effect sufficient to state a claim of unconstitutional partisan gerrymandering. 13

III. Appellants' argument that this Court should extend the lower standard for racial gerrymandering claims articulated in

Shaw I to partisan gerrymandering claims disconnects that ruling from its legal and factual foundation and was properly rejected by the District Court. 18

IV. Appellants do not state a cognizable art 1, § 4 claim.. 22

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INTRODUCTION

Pursuant to Supreme Court Rule 18.6, Candice S. Miller, Secretary of State for the State of Michigan and Christopher M. Thomas, Director of the Bureau of Elections for the State of Michigan, (State Appellees herein and Defendants below), move to dismiss this appeal for lack of jurisdiction or, in the alternative, to summarily affirm the order below because the questions presented by Appellants for review are so insubstantial as to require no further briefing or oral argument.

STATEMENT OF THE CASE

A. Facts Relevant to this Motion.[1]

As a result of the 2000 census Michigan lost one congressional seat. The State redrew its congressional districts, reducing the number of districts from 16 to 15. 2001 Congressional Districting Plan ("2001 Plan"), 2001 PA 115; MCL 3.51-3.55. The population of districts 1-9 and 11-15 is 662,563 and the population of district 10 is 662,562. MCL 3.54(e)(i).

In enacting the 2001 Plan, as indicated in § 4(a) of the act, the Legislature followed the neutral redistricting principles it had previously set forth in § 3 of the 1999 Congressional Redistricting Act, MCL 3.63. *See*, MCL 3.54(a) (stating the Legislature's intention to comply fully with those criteria). These criteria include that districts be contiguous and break as few county and municipal boundaries as is reasonably possible. MCL 3.63(c). In a concurrent resolution submitted to the Governor with the enacted plan, the Legislature explained that "[t]his is the plan which is most in compliance with the statutory redistricting criteria, constitutional, and statutory requirements of any plan before the Legislature." House Concurrent Resolution 34, 2001 Journal of the Senate 1218 (No. 58, July 11, 2001).

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[1] Due to the Appellants' many mischaracterizations of the facts, as well as blatantly erroneous statements, it is necessary for the State Appellees to present a somewhat more detailed statement of facts than otherwise would be necessary. At the outset, it must be noted that the decision below was one made on the pleadings, so while the lower court was required to assume facts as pleaded, there were no factual findings made below. Notwithstanding that procedural posture, Appellants misleadingly assert that statistical and expert analyses confirm and verify that which has merely been alleged. *See e.g.*, JS at 4. Further examples of the liberties that Appellants have taken with the record will be highlighted in the following statement of facts.

After passage of the act by the Legislature and adjournment for the summer, it was discovered that in the 41 pages of legal descriptions consisting of census block and tract numbers, two tracts, 416200 and 422900, were inadvertently left out of the legal description of District 15. *Leroux v Miller,* 465 Mich 594, 604 (2002).[2] The two tracts represented 4,578 people. *Id.* Without these two tracts, district 15 would have a population of 657,985. *Id.* at 607-08. Section 4(e)(i) of the act states, however, that the Legislature assigned 662,563 people to District 15. MCL 3.54(e)(i). Accordingly, Secretary of the Senate Carol Viventi, in exercise of authority granted to her by the Legislature pursuant to Rule 12 of the Joint Rules of the Senate and House of Representatives, included these two tracts in the final draft, thereby correcting the inconsistency and reflecting the clear intent of the Legislature. *Id.* at 608, 612, 614.

In *Leroux,* the Michigan Supreme Court upheld the 2001 Plan as validly enacted under the Michigan Constitution and rejected claims that the plan should be stricken under the 1999 Congressional Redistricting Act.[3] Consequently, Appellants' assertion that the 2001 Plan violates state law by

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[2] Appellants' counsel represented the plaintiffs in this state law challenge to the 2001 Plan.

[3] Appellants' reliance on the District Court's statement that the enactment of the 2001 Plan was "marked by a host of procedural defects'" (JS at 6) and their assertion that "the bill passed by the Legislature . . . differed from the bill signed by the Governor" (JS at 7) brazenly disregards the unequivocal rulings by the Michigan Supreme Court rejecting those allegations. In *Leroux,* the Court held that the Secretary of the Senate's actions "implemented the clear intent of the Legislature" and that the enactment of the 2001 plan was constitutionally valid. 465 Mich at 596, 614. Additionally, Appellants misinform this Court by asserting that the Michigan Supreme Court "divided along partisan lines" to uphold the validity of the 2001 Plan. JS at 7. Only one Justice, Justice Kelly, dissented in that decision; the other Justice nominated by the Democratic Party, Justice Cavanagh, concurred with the majority.

not complying with the 1999 Congressional Redistricting Act is patently incorrect. *See* Jurisdictional Statement (JS) at 5.[4]

While the Legislature was not bound by the criteria set forth in the 1999 Congressional Redistricting Act, the Legislature nonetheless followed those criteria. No other plan introduced at the time the Legislature redistricted the State's congressional districts had fewer breaks of county and municipal boundaries. Appellants misleadingly argue that Democrats introduced a second alternative plan that better met the non-binding criteria followed by the Legislature. JS at 5. Appellants fail to note, however, that "the second alternative plan" was introduced in October 2001 – three months after the Legislature had enacted the 2001 Plan and one month after the Governor had signed it into law. At that time, the Legislature had moved on to address other pressing legislative matters such as the budget.

B. Procedural History and Decision Below

On May 24, 2002, the District Court dismissed Appellants' first amended complaint. While the District Court dismissed the bulk of that complaint with prejudice, it allowed Appellants 30 days to file a second amended complaint stating a claim of unconstitutional partisan gerrymandering under *Davis v Bandemer*, 478 US 109 (1986). The June 5, 2002 order appealed herein is the District Court's dismissal of Appellants' Second Amended Complaint. JS App at 20a-22a. That order neither grants nor denies injunctive relief.

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[4] Similarly, Appellants erroneously imply that the Michigan Supreme Court held that the criteria in the 1999 Congressional Redistricting Act were reenacted in 2001. JS at 6. In *Leroux*, however, the Court expressly rejected that argument, holding: "§4(a) [of PA 115] does not incorporate the 1999 guidelines as an enforceable provision of 2001 PA 115 . . . . [r]ather, §4(a) is merely part of the Legislature's explanation of the principles it used in developing the plan." *Leroux*, 465 Mich at 617.

In dismissing Appellants' equal protection claim, the District Court analyzed the three elements required by this Court in *Bandemer*, properly holding "that to prevail on a valid partisan gerrymandering claim the plaintiff must prove '[1] intentional discrimination [2] against an identifiable political group and [3] an actual discriminatory effect on that group.'" JS App at 5a (quoting *Bandemer*, 478 US at 127) (brackets added by District Court). *See also* 478 US at 161 (Powell, J., dissenting) (agreeing that these are the required proofs). Appellants' failure to establish the third element, an actual discriminatory effect, is the basis of the District Court's dismissal of this claim.

The District Court held that, for majority party plaintiffs such as Appellants, "a finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of the voters.*" *Id.* at 7a (quoting *Bandemer,* at 133) (emphasis added by the District Court). The District Court held that this showing is not made by a mere allegation of disproportionate representation, but rather requires some substantial permanency to the arrangement. *Id.* at 7a-8a, 11a (discussing the *Bandemer* plurality's rejection of the claim before it based on the absence of any evidence that the plaintiffs there had no hope of improving their fate in the next reapportionment).

Applying this requirement for a substantially permanent harm, the District Court found that Appellants "have not alleged that they have been shut out of the process or that the challenged congressional redistricting plan is one from which they cannot recover or substantially improve upon." [5]

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[5] Appellants misleadingly imply that the District Court, in evaluating whether they had been shut out of the political process as a whole, required Appellants to show interference with core party functions such as party registration, organizing, voting, fund-raising or campaigning. JS at 8-9.

Id. at 8a. The District Court held that, while Appellants "alleged disproportionality in abundance," they did not allege "the 'other indicia' which is required to show the discriminatory effect which *Bandemer* requires." *Id.* at 14a. Because "plaintiffs must set forth allegations which, if proven, justify court intervention into an essentially legislative process," and Appellants did not do so, the District Court held that Appellants had failed to state an actionable partisan gerrymandering claim under the Equal Protection Clause. *Id.* at 14a.

Appellants did not cure these fatal deficiencies in their Second Amended Complaint. *Id.* at 21a-22a. On the contrary, the District Court found that Appellants "concede[] that a political solution to their redistricting complaint is within reach by the next decade, or such other times as redistricting may lawfully occur at the direction of the state legislature." *Id.* at 21a.[6] Additionally, the District Court noted that Appellants similarly concede that Republican representatives "are likely to 'respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved.'" *Id.* at 22a (quoting Second Amended Complaint, ¶¶ 56-57). Thus, the District Court held that "the Second Amended Complaint, . . . , like its immediate predecessor, fails to state a claim under the Fourteenth Amendment to the United States Constitution upon which relief can be granted" and dismissed that complaint with prejudice. *Id.* at 21a-22a.

The District Court expressly rejected the notion that it was necessary for Appellants to make such showings. *Id.* at 10a-11a, n4.

[6] With respect to that last point, the District Court specifically noted that there is no state law that precludes redistricting from occurring before the next census. *Id.* at 21a, n1.

SUMMARY OF THE ARGUMENT

Appellants claim a direct appeal to this Court under 28 USC § 1253. Section 1253, however, only allows direct appeals from an "order granting or denying . . . injunctive relief." The June 5, 2002 order appealed herein does not grant or deny injunctive relief. Consequently, this Court lacks jurisdiction over this matter and the State Appellees respectfully request that this Court dismiss this appeal.

Alternatively, the State Appellees move this Court to summarily affirm the District Court decision. Appellants' partisan gerrymandering claim is facially and fatally deficient under *Davis v Bandemer,* 478 US 109 (1986). Appellants rely on the inadequate allegation that the 2001 Plan will deny Democrat voters proportional representation. In *Bandemer*, this Court rejected the proposition that the Equal Protection Clause entitles voters to proportional representation. *Bandemer,* 478 US at 132 (White, J., plurality); 478 US at 147, 158-60 (O' Connor, J., concurring). Appellants do not otherwise allege facts constituting an unconstitutional discriminatory effect and therefore failed to state a claim under the Equal Protection Clause.

Appellants' claims under *Shaw v Reno*, 509 US 630 (*Shaw I*) and art 1, § 4 are equally foreclosed. This Court should reject Appellants' invitation to apply *Shaw I* beyond the legal and factual historical foundation that compelled this Court to recognize a cause of action for racial gerrymandering that does not require a showing of actual vote dilution. Partisan gerrymandering does not cause the special harms posed by racial gerrymandering that prompted the *Shaw I* cause of action, and thus, that more lenient burden of proof is inapplicable to Appellants' claim. Similarly, Appellants urge this Court to apply art 1, § 4 in a manner that is unsupported by the language and history of that provision, as well as this Court's precedent. As this appeal is so insubstantial as to

require no further briefing or oral argument, summary affirmance is appropriate.

ARGUMENT

I. Appellants do not have a direct appeal to this Court from the District Court's decision granting summary disposition to the joint defendants, as that decision is not an order granting or denying injunctive relief. Thus, this Court does not have jurisdiction under 28 USC § 1253.

28 USC § 1253, under which Appellants assert this Court's jurisdiction, provides a direct appeal to this Court from "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction" in actions required to be heard by three judge panels. The June 5, 2002 order appealed herein does not grant or deny injunctive relief; rather, this order dismisses Appellants' claim pursuant to Rule 12(b)(6) for failure to state a claim. As such, it cannot be directly appealed to this Court under § 1253.

In *Mitchell v Donovan*, 398 US 427 (1970), this Court held that § 1253 does not provide jurisdiction over appeals from orders that merely grant or deny declaratory judgment:

> Section 1253 by its terms grants this Court jurisdiction **only** of appeals from orders granting or denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. . . .We have stressed that the three-judge-court legislation is not "a measure of broad social policy to be construed with great liberality," but is rather "an enactment technical in the strict sense of the term and to be applied as such." *Phillips v United States*, 312 US 246, 251. Thus this Court's jurisdiction under that

> legislation is to be literally construed. It would hardly be faithful to such a construction to read the statutory term "injunction" as meaning "declaratory judgment." [398 US at 430-431 (citations and footnotes omitted) (emphasis added)][7]

Relying on similar reasons, in *Goldstein v Cox,* 396 US 471 (1970), this Court dismissed an appeal from a denial of summary judgment that did not include a grant or denial of injunctive relief. The Court held that it was not sufficient that the plaintiffs had prayed for permanent and preliminary injunctive relief in their complaint and even nominally requested that relief in their motion for summary judgment, because "they took no practical step toward obtaining such relief" and the order denying the summary judgment motion did not include such relief. 396 US at 478-79.[8]

Like the *Goldstein* plaintiffs, while the Appellants here nominally sought injunctive relief in their complaint, they took no steps in pursuit of that relief. The only injunction entered below was the District Court's *sua sponte* decision to change Michigan's congressional filing deadline. Significantly, that May 15, 2002 order was not an injunction of the 2001 Plan and it was not appealed. *See Spannaus v Hodgson*, 420 US 903 (1975) ("It is of no consequence that a preliminary injunction was continued in effect until determination of this appeal, since no appeal was taken from that preliminary injunction.");

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[7] *See also, Carey v Wynn*, 439 US 8 (1978) (dismissing a § 1253 appeal for want of jurisdiction because, while granting declaratory relief in favor of the plaintiffs and acknowledging an entitlement to injunctive relief, the lower court did not grant such injunctive relief); *Gerstein v Coe,* 417 US 279 (1974) (same).

[8] *See also Gonzales v Automatic Employees Credit Union*, 419 US 90 (1974) (rejecting the argument that a summary judgment dismissal of a complaint that sought injunctive relief constituted a denial of injunctive relief such that a direct appeal would lie under § 1253).

Mitchell, supra, at 429 (no jurisdiction where no appeal was taken from the initial grant of injunctive relief).

Additionally, it is clear that the historical purpose for allowing direct appeals to this Court, i.e., limiting injury from improvidently granted injunctions of state law, is not served by allowing a direct appeal from this dismissal of Appellants' Second Amended Complaint for failure to state a claim.[9] It is equally clear that the congressional intent to narrowly confine this Court's mandatory appellate docket is harmed if § 1253 is extended to reach final, non-injunctive, orders such as June 5, 2002 order appealed here. *See, supra,* footnote 9.

Unlike the direct appeal from the Texas redistricting decision that this Court entertained in *White v Regester*, 412 US 755 (1973), the order appealed here does not contain any injunctive relief. It was only because the order in *White* contained both declaratory and injunctive relief that this Court held it had jurisdiction over that matter: "[A]lthough appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, we conclude that we have jurisdiction of the entire appeal [because the Court below ordered both declaratory and injunctive relief]." *Id.* at 761 (citations omitted). Based on the foregoing, the State Appellees respectfully request this Court to dismiss this appeal for want of jurisdiction.

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[9] *See e.g., Goldstein, supra,* at 476-78 (discussing the historical purpose of direct appeal statutes and the canon of construction that requires § 1253 to be narrowly construed in order to serve Congress's intent that this Court's mandatory appellate docket be narrowly confined).

II. Appellants do not state an actionable partisan gerrymandering claim under the Equal Protection Clause and the District Court's dismissal of that claim should be summarily affirmed.

A. In *Bandemer* this Court rejected the notion that the Equal Protection Clause entitles voters to proportional representation. The District Court properly dismissed Appellant's partisan gerrymandering equal protection claim because it is, at core, an allegation of disproportionate representation.

The sum and substance of Appellants' partisan gerrymandering claim is their allegation that under the 2001 Plan Democrats likely will be elected to six or maybe five seats out of a congressional delegation of fifteen. Second Amended Complaint, ¶¶ 14, 50, 51;[10] JS App at 29a, 44a-46a. Such a result, they claim, would be inconsistent with their statewide vote totals,[11] thereby constituting an unconstitutional partisan gerrymander under the Equal Protection Clause. *Id.*

In *Bandemer*, however, a majority of this Court rejected the notion that voters or groups of voters are constitutionally entitled to proportional representation. 478 US at 132, 147, 158-60. Relying on the Court's rulings in *Whitcomb v Chavis*, 403 US 124, 153, 156, 160 (1971) and *White v Regester*,412 US 755, 765-766 (1973), the *Bandemer* plurality recognized that:

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[10] Appellants' Second Amended Complaint has two paragraphs numbered "51." JS App at 45a-46a. It is the second paragraph 51 that is cited here.

[11] Appellants claim that "Michigan is a politically competitive State" (Second Amended Complaint, ¶ 47, JS App at 43a), with "Michigan voters today lean[ing] somewhat Democratic in federal elections and slightly Republican in state elections." JS at 3.

> Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be. [*Id.*]

Disproportionate representation, the *Bandemer* plurality explained, "is inherent in winner-take-all, district-based elections, and we cannot hold that . . . a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates." *Id.* "[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation does not constitute impermissible discrimination under the Equal Protection Clause." *Id.* at 132.

Justice O' Connor, writing a concurring opinion in which then-Chief Justice Burger and Justice Rehnquist joined, also rejected the notion that voters are entitled to proportional representation. *See* 478 US at 147, 158-60 (O' Connor, J., concurring). The concurring justices would have held that the Equal Protection Clause did not protect against partisan gerrymandering, which they believed to be a nonjusticiable political question. *Id.* at 144.

Because Appellants merely allege that Democrats will be unable to secure proportional representation, they have not alleged that the 2001 Plan has an unconstitutional discriminatory effect. Appellants' partisan gerrymandering claim is clearly foreclosed by *Bandemer* and the District Court properly dismissed it for failure to state a claim. No further

briefing or oral argument is necessary and summary affirmance is appropriate.

B. Appellants do not otherwise allege an actual discriminatory effect sufficient to state a claim of unconstitutional partisan gerrymandering.

While Appellants erroneously argue that the disproportionate results they predict render the 2001 Plan unconstitutional, they nominally attempt to allege secondary effects to satisfy the *Bandemer* plurality's requirement for "a substantially greater showing of adverse effect than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Id.* at 131. Unconstitutional discrimination, the *Bandemer* plurality explained, "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

Relying on this Court's racial gerrymandering decisions, the *Bandemer* plurality articulated the following threshold requirement for a partisan gerrymandering claim:

> In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process. In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only

> where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia. [*Id.* at 139-40 (internal citation and footnote omitted).]

Applying this standard, the District Court properly held that, while Appellants alleged disproportionate results, they did not allege "the 'other indicia' which is required to show the discriminatory effect which *Bandemer* requires." JS App at 14a. In its initial dismissal of this claim, the District Court specifically found that:

> Plaintiffs do not allege (1) that they have no chance of obtaining more favorable congressional districts in the next reapportionment; (2) that Republican candidates would be indifferent to the interests of Democratic citizens; or (3) that the challenged plan would result in Democrats being essentially 'shut out' of the political process; therefore, plaintiffs do not state a cognizable equal protection claim. Nor does the amended complaint contain allegations from which these consequences could be inferred. [JS App at 13a]

In its dismissal of Appellants' Second Amended Complaint, the District Court held that Appellants had not cured these fatal defects, specifically finding that Appellants continued to allege facts that precluded them from stating a cognizable claim. JS App at 21a-22a (finding that Appellants' own pleading reveals the possibility of a political solution and that Democrats' interests will not be entirely ignored).

Appellants do not contest the District Court findings. Instead, Appellants argue that the District Court misconstrued *Bandemer* and effectively overruled that decision. J.S. at 16-

17. Close examination of the District Court's opinion, however, reveals that the District Court properly applied the *Bandemer* plurality's intentionally rigorous standard. Moreover, as the *Bandemer* plurality recognized, a high threshold is an appropriate and necessary protection against embroiling federal courts in the States' inherent political and legislative redistricting function. *See,* 478 US at 133-34, 142-43. The District Court recognized and properly applied the high threshold set forth in *Bandemer.* JS App at 6a.

In an effort to avoid this high threshold, it is Appellants who offer a misconstruction of *Bandemer.* Appellants rely on a footnote that addresses the justiciability issue and proffer that as the authoritative standard for determining unconstitutional discriminatory effect. Specifically, quoting footnote nine of the plurality opinion, Appellants assert that *Bandemer* stands for the proposition that "redistricting should achieve 'a level of parity between votes and representation sufficient to ensure that significant minority votes are heard and that majorities are not consigned to minority status." JS at 14-15 (quoting *Bandemer* at 126 n9).

This quoted material from *Bandemer*, however, represents the Court's[12] rejection of the argument that the matter was not justiciable and did not purport to articulate the proofs necessary to demonstrate an unconstitutional discriminatory effect. While the Court acknowledged a preference for majorities not being consigned to minority status in this footnote, the Court did not articulate what effect would render a districting plan unconstitutional. The plurality, however, does provide that analysis in Part III of Justice White's opinion.

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[12] A majority of the Court joined in this part, Part II, of Justice White's opinion.

Specifically, in Part III of Justice White's opinion, the plurality explains that in determining whether a redistricting plan has an unconstitutional discriminatory effect "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." 478 US at 132-133. Because partisan gerrymandering claims present a "considerably more complex context" than one person, one vote claims, the plurality underscored that "it is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions." *Id.* at 134.

For an effect to be sufficiently serious to require such intervention, the plurality noted the Court has required both a history of disproportionate results and "strong indicia of lack of political power and the denial of fair representation." 478 US at 139-40. That strong indicia of unconstitutional discriminatory effect includes proof that the complaining voters have no hope of doing better in the next reapportionment and that their interests will be entirely ignored by the elected representatives. *Id.* at 132, 135-36, 139-40. The District Court correctly understood that Appellants were required to demonstrate these "other indicia" in order to show that the 2001 Plan's alleged detrimental impact has a "substantial permanency" that rises to a level of unconstitutional discriminatory effect. *See* JS App at 8a. Notwithstanding the Appellants' self-serving argument that these factors are impossible to demonstrate, the required showing of something more than "transitory results" (*Bandemer*, at 140) is the demanding threshold test the plurality articulated as necessary to demonstrate unconstitutionality and to avoid the judiciary usurping the political and legislative redistricting function.

As Appellants' attack on the legislative process and state redistricting criteria reveals, in place of that self-

avowedly demanding standard articulated by the *Bandemer* plurality, Appellants would have this Court adopt an analysis akin to that suggested by Justice Powell in his dissent. That dissenting analysis, however, was rejected by this Court.

Moreover, by advocating that unconstitutionality be determined by a sole requirement for a rough proportionality between votes and seats regardless of a party's ability to otherwise influence the political process and control future redistricting efforts,[13] Appellants proffer a standard that represents exactly what Justice O' Connor predicted would be the calamitous result of treating partisan gerrymandering claims as justiciable. 478 US at 155. Justice O' Connor, then-Chief Justice Burger and Justice Rehnquist joining, cautioned that courts would be pressured "toward some form of rough proportional representation" that is inconsistent "with our history, our traditions, [and] our political institutions." *Id.* at 145. The District Court's rejection of Appellants' standard, therefore, is not a misconstruction of *Bandemer*; on the contrary, the District Court opinion faithfully followed the *Bandemer* plurality opinion and, in so doing, avoided the constitutionally objectionable result that Justice O' Connor cautioned against.

In sum, Appellants urge this Court to adopt an equal protection standard that demands proportional representation, a concept that this Court rejected in *Bandemer*. No further briefing or oral argument is necessary in order for this Court to reject that argument.

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[13] Appellants, with no textual support, assert that "under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the popular vote statewide." JS at 20.

III. Appellants' argument that this Court should extend the lower standard for racial gerrymandering claims articulated in *Shaw I* to partisan gerrymandering claims disconnects that ruling from its legal and factual foundation and was properly rejected by the District Court.

Appellants claim that the racial gerrymandering standard articulated in *Shaw I* and in *Miller v Johnson,* 515 US 900 (1995), should also govern partisan gerrymandering claims, arguing that "[t]his Court, having interpreted the Fourteenth Amendment as requiring strict scrutiny of districts drawn predominantly on the basis of voters' race, should take the next step and recognize that districts drawn predominantly on the basis of voters' political viewpoint are also constitutionally suspect." JS at 24. This argument divorces *Shaw I* and *Miller* from the factual and legal foundation upon which the Court relied to recognize a racial gerrymandering claim that did not require a showing of actual vote dilution. Moreover, as the District Court properly recognized (JS App at 13a-14a, n5), Appellants' assertion that *Shaw I* and *Miller* should be extended to partisan gerrymandering claims is directly contrary to this Court's longstanding recognition that redistricting is an inherently political enterprise. *See e.g., Gaffney v Cummings*, 412 US 735, 752-53 (1973) ("Politics and political considerations are inseparable from districting and apportionment.")

In *Shaw I*, this Court recognized a distinct cause of action for racial gerrymandering that does not rely on actual vote dilution, but rather arises from the fact that "[c]lassifying citizens by race . . . threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis." *Id.* at 649-50. In *Miller, supra,* this Court clarified

that to make out that type of racial gerrymandering claim a plaintiff must prove:

> that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. [515 US at 916]

Contrary to the Court's conclusion in *Shaw I* and *Miller* that the Equal Protection Clause may be violated when racial considerations motivate the districting process even when there is no actual vote dilution, the *Bandemer* plurality expressly rejected the parallel conclusion with respect to the consideration of partisan concerns in drawing district lines. *Bandemer, supra,* at 138-39. Specifically, the *Bandemer* plurality rejected Justice Powell's conclusion that, in some instances, "the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause in and of itself." *Id.*

The basis for these divergent standards for racial and partisan gerrymandering was thoroughly explained by the Court in *Shaw I* and *Miller*: our Nation's long and regrettable history of racial discrimination in voting. *See Shaw I, supra,* at 639-641 (discussing that history and explaining that "it is against this backdrop that we confront the questions presented here."); *Miller, supra,* at 904 (explaining that "our Nation's constitutional and demographic history" is the reason that racial classifications are subjected to "the most exacting of judicial scrutiny.") It is that history the Court cited in *Shaw I*

when it rejected the assertion that "a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders." *Shaw I,* at 650. As the Court explained in *Shaw I*:

> our country's long and persistent history of racial discrimination in voting – as well as our Fourteenth Amendment jurisprudence, which has always reserved the strictest scrutiny for discrimination on the basis of race – would seem to compel the conclusion that racial and political gerrymandering claims are not subject to precisely the same constitutional scrutiny. [*Id.* at 650.]

Because of that historical context, *Shaw I* explained, the use of impermissible racial stereotypes in racial gerrymandering causes special harms:

> [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways [than just vote dilution.] It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. [*Id.* at 650.]

The impermissible racial stereotype implicit in such districting plans is "the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. In contrast, voters affiliate with a political party as a matter of choice because they, in fact, do "think alike, share the same political interests, and will prefer the same candidates at the polls." Thus, consideration of political affiliation does not

impermissibly stereotype voters based on a wrongful, and certainly not historically injurious, perception regarding their political views.

Racial classifications "threaten[] to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657. The historical underpinnings of *Shaw I,* and the special harms posed by that history, are quite simply not present in the partisan gerrymandering claim context. This Court has held that "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw I, supra,* at 643-44 (quoting *Personnel Administrator of Mass v Feeney*, 442 US 256, 272 (1979)). Juxtaposed against that holding is the Court's express and repeated recognition that redistricting is inherently a political endeavor and that protecting partisan interests by drawing district lines based on political affiliation is constitutionally legitimate. *See e.g., Hunt v Cromartie*, 532 US 234, 243 (2001) ("*Hunt II*") (recognizing political affiliation as a legitimate factor to consider when drawing district lines and holding that when politics, not race, predominates the redistricting process plaintiffs have not proven unconstitutional racial gerrymandering); *Hunt v Cromartie*, 526 US 541, 551 (1999) ("*Hunt I*") ("our prior decisions have made clear that a jurisdiction may engage in constitutional political party gerrymandering"); *Bush v Vera*, 517 US 952, 968 (1996) (recognizing that consideration of political affiliation is constitutionally legitimate).

As the *Bandemer* plurality noted, adopting a low threshold for partisan gerrymandering claims, as Appellants urge this Court to do in their *Shaw I* claim, "would invite attack on all or almost all reapportionment statutes." 478 US at 133. The *Bandemer* plurality cautioned that:

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls. We decline to take a major step toward that end, which would be at odds with our history and experience. [*Id.* at 133-143]

In urging this Court to apply the *Shaw I* and *Miller* racial gerrymandering standard to partisan gerrymandering claims Appellants ask this Court to remove the political task of redistricting from state legislatures and place it in the courts. The District Court properly declined to take that step and rejected Appellants' attempt to divorce *Shaw I* and *Miller* from their legal and factual foundation by applying those decisions to partisan gerrymandering claims. No further briefing or oral argument is necessary in order for this Court to summarily affirm that decision.

IV. Appellants do not state a cognizable art 1, § 4 claim.

Appellants assert that the "Elections Clause," US Const art 1, § 4, "fundamentally limits a state legislature's power to gerrymander congressional districts." JS at 24-30. Despite a total absence of textual support from the language of art 1, § 4, Appellants attempt to rely on *US Term Limits v Thornton*, 514 US 779 (1995) and *Cook v Gralike*, 531 US 510 (2001), to argue that the Framers' mistrust of state legislatures motivated them to adopt art 1, § 4 as a limitation on states' congressional redistricting authority. Appellants' selective quotation of *US Term Limits* and historical documents, however, fundamentally distorts that decision as well as art 1, § 4's purpose. As this Court recognized in *US Term Limits*, art 1, § 4 does not even require a state to hold district-based congressional elections

and, at the time the Constitution was being ratified, at-large elections were, in fact, common. 514 US at 832-33 (quoting James Madison's statements that art 1, § 4 grants the states the power to hold either district or at-large elections); *Id.* at 904 (J. Thomas, dissenting) (noting the early prevalence of at-large elections). Because art 1, § 4 does not require congressional districting, Appellants fundamentally misconstrue art 1, § 4 by arguing that it substantively limits **how** states must redistrict their congressional seats.[14]

US Term Limits is first and foremost a decision regarding the Qualification Clauses. In *US Term Limits* this Court held that the Qualification Clauses (art 1, § 2, cl 2 & art 1, § 3, cl 3) exclusively fix the qualifications for the United States Senate and House of Representatives and that state-imposed term limits violate those provisions. *Id.* at 800-01, 827. The *US Term Limits* defendants unsuccessfully argued that term limits are not a qualification but rather represent the state's reasonable exercise of its "time, place and manner" authority under art 1, § 4. *Id.* at 828, 832. Appellants attempt to rely on this Court's rejection of that argument to support their art 1, § 4 claim.[15] Significantly, and contrary to

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[14] Congress now requires States to enact single-member districting plans. 2 USC § 2c.

[15] Notably, in rejecting the proposition that term limits could properly be conceived as a "time, place, manner" procedural regulation under art 1, § 4, *US Term Limits* held that a necessary consequence of that argument would be that "Congress itself would have the power to 'make or alter' a measure such as [the term limits law before the Court.]" *Id.* at 832. Appellants' assertion that art 1, § 4 substantively limits states' congressional redistricting authority similarly would necessarily dictate congressional, and not judicial, review of challenges to congressional redistricting plans. The extensive caselaw reviewing congressional redistricting plans under the Equal Protection Clause, however, belies any such contention. Moreover, as *US Term Limits* held, just as the Framers were concerned that allowing "Congress to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate

Appellants' construction of art 1, § 4 as a limitation on power, *US Term Limits* recognized that the history of art 1, § 4 demonstrates that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations." *Id.* at 833 (emphasis added). In that decision this Court simply held that art 1, § 4 cannot grant authority to the states to set qualifications for federal offices when other, more specific, provisions of the Constitution (i.e., the Qualification Clauses) deny the states that power. *Id.* at 829 (stating that "[a]s we have often noted, 'constitutional rights would be of little value if they could be . . . indirectly denied.'") (ellipsis in *US Term Limits*).

Thus, while *US Term Limits'* discussion of art 1, § 4 is best understood as respecting this most fundamental principle of constitutional construction, Appellants urge this Court to read that decision as supporting a sweeping construction of art 1, § 4 that has no historical or textual support. Appellants ask this Court to read into art 1, § 4 a limitation on States that requires them to strive for "absolute neutrality" when enacting congressional redistricting plans. JS at 29. Not only is there nothing in *US Term Limits* to support such a broad reading, that interpretation of art 1, § 4 directly conflicts with this Court's decisions that have repeatedly recognized the inherently political nature of redistricting and upheld partisan concerns as constitutionally legitimate factors. *See e.g., Hunt II, supra,* at 243; *Hunt I, supra,* at 551.

Plaintiffs' reliance on *Cook, supra,* is similarly misplaced. In *Cook*, this Court held that a ballot label indicating a congressional candidate's support or non-support for term limits was not a valid exercise of the state's art 1, § 4 time, place, and manner regulation of elections. *Id.* at 523-26. Such a label is not a procedural regulation and is thus not

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constitutional balance," (*Id.* at 832), allowing Congress to have ultimate control over the redistricting process could lead to similar grave injuries.

authorized by art 1, § 4. *Id.* at 525-26. Like *US Term Limits*, nothing in *Cook* supports the proposition that art 1, § 4 imposes substantive limitations on congressional redistricting.

In *US Term Limits* and *Cook,* this Court was called upon to evaluate the scope of art 1, § 4's grant of regulatory power. When this Court has been asked to evaluate the limits of that power, *i.e.*, to answer whether an election law unconstitutionally infringes the right to vote, it has done so under the auspices of the First and Fourteenth Amendments. *See, eg, Anderson v Celebrezze*, 460 US 780, 788 (1983); *Burdick v Takushi*, 504 US 428, 441 (1992). In *Bandemer*, this Court undertook just such an analysis. It is the Equal Protection Clause that limits states' congressional redistricting, not art 1, § 4. Appellants do not point to anything within *Bandemer* that supports limiting its equal protection analyses to state legislative redistricting challenges or that indicates that art 1, § 4 plays any role in that analysis. Appellants have provided this Court no basis to depart from its established jurisprudence of applying equal protection analyses to claims alleging infringement on voting rights. The District Court properly dismissed Appellants' unsupported art 1, § 4 claim and no further briefing or oral argument is required for this Court to summarily affirm that decision.

CONCLUSION

The Court should dismiss this appeal or summarily affirm the District Court decision.

Respectfully submitted,

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Dated: September, 2002

No. 02-200

IN THE

Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Appellants,

v.

CANDICE S. MILLER and CHRISTOPHER M. THOMAS,

Appellees,

-and-

THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, and JAMES L. PALASKE,

Intervening Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MOTION OF INTERVENING DEFENDANTS/ APPELLEES TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a challenge to an enacted congressional districting plan where Appellants allege that the plan dilutes the votes of individuals who prefer to vote for Democratic candidates.

2. Whether Appellants have standing to assert that an enacted congressional districting plan violates the Equal Protection Clause because political party preference was the predominant factor used to define district lines, where Appellants reside in districts alleged to be safe districts for their preferred political party, in districts alleged to be competitive, or districts in which elected members of Congress are alleged to listen to their constituents regardless of the constituent's political party affiliation.

3. Whether this Court should summarily affirm the district court's dismissal of an equal protection claim alleging a congressional districting plan reflects unconstitutional political gerrymandering where Appellants allege disproportionate representation, but fail to allege other indicia of a denial of fair representation.

4. Whether this Court should summarily affirm the district court's dismissal of an equal protection claim alleging that political factors predominated over traditional districting criteria in a state legislature's adoption of a congressional districting plan.

5. Whether this Court should summarily affirm the district court's dismissal of a challenge to a congressional districting plan brought under Article I, § 2 or § 4 of the U.S. Constitution, where that plan meets Article I's equality of population requirement.

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Pursuant to Supreme Court Rule 18.6, the Michigan Republican Party, Patrick Miller, Andrew Pettress, and James L. Palaske (Appellees herein and Intervening Defendants below), move to dismiss the present appeal for lack of jurisdiction or, in the alternative, to affirm the district court's judgment dismissing Appellants' claims as that judgment is the only proper result under the Court's jurisprudence and thus no further briefing or oral argument is required.

I. STATEMENT OF THE CASE

A. Facts Relevant To This Motion

Appellants, voters who prefer to vote for Democratic candidates, challenge the Michigan Legislature's enacted congressional districting plan[1] because they predict that this plan will yield one or two more Republican seats than most of their proffered alternative plans.

As Appellants assert in their complaints, Michigan is a politically competitive state. (J.S. App. 43a; Motion App. 19a, ¶ 42).[2] At various times in the state's history, the electorate has favored Democratic and Republican presidential candidates. (J.S. App. 44a; Motion App. 20a, ¶ 44). At the time the 2000

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1. A map depicting the congressional districts defined by the Michigan Legislature is attached. (Motion App. 1a). This map is available at http://www.state.mi.us/census2000/2000_districts/congress_state.pdf.

2. "J.S. App." refers to the Appendix attached to Appellants' Jurisdictional Statement ("J.S."). Intervening Defendants attach a copy of Appellants' Amended Complaint because the Amended Complaint that Appellants included in their Appendix (J.S. App. 52a-73a) *is not the same document that was filed in the district court.* In comparison to the filed version, the document attached to Appellants' Jurisdictional Statement excludes a number of fundamental assertions (*e.g.*, that Michigan is a politically competitive state, *see* Motion App. 19a, ¶ 42), has different wording within several paragraphs, and is signed by a different attorney.

census was released, Michigan sent to Washington two Democratic senators, nine Democratic representatives, and seven Republican representatives. (J.S. App. 43a; Motion App. 19a, ¶ 42). Michigan voters had elected sufficient Republican senators and representatives to the state's legislature, on the other hand, so as to give Republicans a majority of seats in each house of that body. (J.S. App. 31a; Motion App. 7a, ¶ 16).

As the Michigan Legislature found, upon release of the 2000 census it became clear that Michigan's congressional district lines would need to be redefined. Michigan's population had grown over the prior decade, but not as much as other states' populations. Thus Michigan was allotted one fewer representative. The population's growth occurred in Detroit's outer suburbs and in the northern portions of the Lower Peninsula; Detroit itself lost population. The new data meant that Michigan's districts were no longer in compliance with Article I, § 2's equality of population requirement. House Concurrent Resolution 34 ("HCR 34"), 2001 Journal of the Michigan House 1382-1384 (No. 58, July 10, 2001), (Motion App. 28a).

Michigan Senate Bill 546 was introduced on June 14, 2001. 2001 Journal of the Michigan Senate 736 (No. 55, June 14, 2001). After a June 25, 2001 hearing, the Senate Committee on Reapportionment reported the bill to the Senate floor. 2001 Journal of the Michigan Senate 1063 (No. 56, June 26, 2001). The full Senate voted in favor of the bill on June 26, 2001. *Id.* at 833. The House Committee on Redistricting and Elections met on July 10, 2001 to consider SB 546. That Committee voted in favor of SB 546 on July 10, 2001. 2001 Journal of the Michigan House 1390 (No. 58, July 10, 2001). The full House took up consideration of SB 546 on July 11, 2001, and thereafter passed the bill. The House also adopted HCR 34, which explained SB 546 and urged the Governor to sign the bill.

2001 Journal of the Michigan House 1562, 1568 (No. 59, July 11, 2001).[3]

In its consideration of SB 546, the House rejected the two plans proposed by Democratic representatives. *See id.* at 1518, 1561-62. The Legislature viewed the adopted plan as "most in compliance with the statutory redistricting criteria, constitutional, and statutory requirements of any plan before the Legislature." (Motion App. 37a). The "statutory redistricting criteria" that the Legislature followed were those presented in the Congressional Redistricting Act of 1999 ("CRA"). Mich. Comp. Laws Ann. § 3.63; (J.S. App. 74a-76a). In addition to language tracking requirements imposed by federal law (*e.g.*, Article I's equality of population mandate), the CRA set forth "secondary" guidelines such as contiguity, breaking as few county boundaries "as is reasonably possible," and breaking as few city and township boundaries "as is reasonably possible." (J.S. App. 74a-75a). The CRA's secondary guidelines were similar to both the criteria used by the Michigan Supreme Court for redistricting the state legislature in 1982 and 1992, and the criteria used by the federal court in drawing Michigan's congressional district lines in 1992. (Motion App. 29a).

After passage of SB 546 by both houses, a technical error was discovered: two census tracts in District 15 were omitted from that District's legal description. Senate Secretary Carol Morey Viventi, in accordance with authority delegated to her by Rule 12 of the Joint Rules of the Michigan House and Senate, made an appropriate technical correction to SB 546 in order to include those two census tracts in District 15's description. *LeRoux v. Secretary of State*, 465 Mich. 594, 640 N.W.2d 849, 860 (2002) (per curiam) (concluding that Secretary Viventi's correction "implemented the clear intent of the Legislature that

3. The Senate also adopted HCR 34. 2001 Journal of the Michigan Senate 1219 (No. 58, July 11, 2001).

the tracts be included in [District 15] and does not invalidate the statute."). Upon presentment, the Governor signed the bill, which, as 2001 PA 115, was then filed with the Secretary of State on September 11, 2001. 2001 Journal of the Michigan Senate 1549, 1558 (No. 60, Sept. 19, 2001).

On October 17, 2001 — after 2001 PA 115's enactment and more than three months after the Legislature deliberated and voted on a new congressional districting plan — Democrats sought to reopen the entire issue of congressional district lines by introducing yet another proposed plan (Appellants' "Second Alternative Plan"). Dealing with other matters at the time, the Legislature understandably did not reopen an issue it had already decided.

B. Procedural History And Decision Below

Appellants filed their initial complaint challenging the constitutionality of 2001 PA 115 (the "2001 Plan") on July 11, 2001. That complaint, which included six claims of constitutional and statutory violations (and a seventh claim that § 1983 was violated), was never served. Appellants filed their Amended Complaint on September 20, 2001, and finally served Defendants on November 7, 2001.

A second set of plaintiffs, also represented by Appellants' counsel, initiated on November 6, 2001 a challenge to the 2001 Plan in the Michigan Supreme Court, contending that the Plan violated the CRA and the Michigan Constitution.[4] The Michigan Supreme Court in *LeRoux v. Secretary of State*, 465 Mich. 594, 640 N.W.2d 849, rejected those challenges.

In an obvious effort to have this Court view with suspicion the Legislature's enactment of the 2001 Plan, Appellants assert

4. The Michigan Legislature in 2001 also enacted plans defining state legislative districts. Those districts have not been challenged in either the state or federal courts.

facts negated by the *LeRoux* decision. First, the Legislature intended to follow, (J.S. App. 77a; Motion App. 29a-35a, 37a), and did follow the CRA's neutral guidelines. The *LeRoux* plaintiffs put forth the same arguments as Appellants do here regarding how the CRA's secondary guidelines were "violated." *See LeRoux*, 640 N.W.2d at 861. The Michigan Supreme Court concluded that the Legislature was not bound by the CRA's secondary guidelines, and thus plaintiffs had no claim. *Id.* This conclusion means, contrary to Appellants' assertions (*e.g.*, J.S. at 5), that the Michigan Legislature could in no way "violate" the CRA's nonbinding guidelines.

Second, Appellants repeatedly assert that the Legislature enacted the CRA's guidelines twice — once in 1999 and again in 2001. (J.S. at 6, 11, 24). This assertion also was put before the Michigan Supreme Court, with plaintiffs contending that the Legislature was bound by the CRA's secondary guidelines because it had re-enacted or otherwise incorporated those guidelines within 2001 PA 115. *See* 640 N.W.2d at 861-62. The Michigan Supreme Court flatly rejected this argument, holding that 2001 PA 115 "does not incorporate the 1999 guidelines as an enforceable provision of 2001 PA 115 that would permit review of the redistricting plan adopted by that statute. Rather, [Mich. Comp. Laws Ann. § 3.54(a)] is merely part of the Legislature's explanation of the principles it used in developing the plan." *Id.* at 861-62. As the *LeRoux* Court noted, the Legislature's "choice to consider those principles [historically used by courts in cases of legislative impasse] does not signal an intention to convert the nonbinding guidelines into a rigid test under which the plan can be challenged by anyone who claims that some other plan better meets the guidelines." *Id.* at 863.

Finally, Appellants describe the *LeRoux* Court as divided along party lines in its judgment with respect to the validity of

the 2001 Plan's enactment. (J.S. at 7). Putting aside any meaning to be ascribed to this assertion, this is a patently untrue statement. A split among the Justices occurred on the issue of whether Secretary Viventi's correction violated the Michigan Constitution. Five Republican Justices concluded that it did not; Justice Cavanagh, a Democrat, wrote separately and concurred in the result; and Justice Kelly, a Democrat, dissented.[5]

After the Michigan Supreme Court decided *LeRoux*, the district court established an expedited discovery and briefing schedule. In accordance with that schedule, on April 19, 2002, Defendants and Intervening Defendants moved that each of the Appellants' claims be dismissed under Rule 12(b)(1) or Rule 12(c).

Consistent with the standard that Rule 12(b)(1) and Rule 12(c) requires a court to apply, the lower court viewed the allegations in Appellants' Amended Complaint as true and interpreted any ambiguities in Appellants' favor. Contrary to what Appellants suggest (*e.g.*, J.S. at 6 ["the 2001 Plan's enactment was, in the District Court's words, marked 'by a host of procedural defects'"]), the district court made no findings.

Appellants' description of the district court's statement of the assumed facts is often inaccurate and incomplete. For example, the district court did not, as Appellants suggest, find evidence of "'abundan[t]' disproportionality between votes and seats," (J.S. at 8); it noted only that Appellants had "alleged disproportionality in abundance." (J.S. App. 14a). The district court's reference to "a host of procedural defects" came in the following sentence: "In addition to the purported deficiencies

5. Neither Justice Cavanagh (concurring in result) nor Justice Kelly (dissenting) spoke in opposition to the conclusion that the Legislature was not bound by the CRA's secondary guidelines.

laid out above, plaintiffs claim the challenged plan's legitimacy is impaired by a host of procedural defects accompanying its enactment." The district court followed this with "The Michigan Supreme Court, however, resolved plaintiffs' procedural claims against them in *LeRoux* . . . and we do not address them here." (J.S. App. 4a).[6]

On May 24, 2002, the district court issued an order dismissing with prejudice five of Appellants' claims (those brought under Article I, the First Amendment, the Fourteenth Amendment's Privileges and Immunities Clause, the Fifteenth Amendment, and the Voting Rights Act). It dismissed without prejudice Appellants' vote dilution claim under *Davis v. Bandemer*, 478 U.S. 109 (1986), and granted Appellants leave to file an amended complaint in thirty days. Appellants filed their Second Amended Complaint on May 29, 2002. Accompanying that Complaint was a Motion for Expedited Trial, which requested that the district court commence trial on June 4, and requested that a decision be rendered by June 7, 2002. (J.S. App. 21a). Because Appellants again failed to allege facts that, if proved, would support a conclusion that the 2001 Plan is the product of unconstitutional political gerrymandering, the district court in its June 5, 2002 Order properly dismissed with prejudice Appellants' Second Amended Complaint.

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6. Appellants also make a number of factual assertions that are not contained in their pleadings and are not judicially cognizable. (*See, e.g.*, J.S. at 3 [comparing Michigan to Southern states]; *id.* [asserting the untrue statement, given Senator Spencer Abraham's victory in 1994, that Democrats prevailed in every senatorial election in Michigan in the last decade]; *id.* at 6 [referencing embarrassing news reports and motivation to minimize further adverse news coverage]; *id.* at 12 [asserting results of an expert witness' analyses]). Given the procedural posture of this case, these assertions must be ignored.

II. ARGUMENT

A. Appellants' Equal Protection Claims Should Be Dismissed For Lack Of Jurisdiction

1. Appellants' Vote Dilution Claim Is Not Justiciable

Intervening Defendants acknowledge that this Court in *Davis v. Bandemer*, 478 U.S. 109 (1986), held that challenges to legislative reapportionment plans asserting vote dilution as a result of political gerrymandering were justiciable under the Equal Protection Clause. However, political gerrymandering claims do pose the real danger of drawing federal courts too far into the political thicket. *See Bandemer*, 478 U.S. at 133. Moreover, Intervening Defendants submit that *Bandemer*'s justiciability holding should not apply to claims challenging congressional districting plans. Because it is not justiciable, this Court does not have subject-matter jurisdiction over Appellants' vote dilution claim.

2. Appellants Do Not Have Standing To Challenge The 2001 Plan Under *Shaw v. Reno*

Appellants assert that they have a viable political gerrymandering claim under *Shaw v. Reno*, 509 U.S. 630 (1993). Even if such a claim exists under the Constitution, Appellants have no standing to challenge the entirety of the 2001 Plan.

Not all voters have standing to bring a *Shaw* claim. "Any citizen able to demonstrate that he or she, personally, has been injured by [the kind of racial classification described in *Shaw*] has standing to challenge the classification in federal court." *United States v. Hays*, 515 U.S. 737, 744 (1995). This means that plaintiffs may not challenge districts other than the one in which they reside without specific evidence that they "personally [have] been subjected to a racial classification." *Shaw v. Hunt*,

517 U.S. 899, 904 (1996). It follows that no individual voter has standing to bring a statewide challenge to a districting plan under *Shaw*. *See Hays*, 515 U.S. at 744 (rejecting the notion that "anybody in the State has a claim" under *Shaw*).

Appellants do not have standing to assert a *Shaw* claim, even if this Court concludes that *Shaw* is applicable to political gerrymandering claims. First, Appellants assert a statewide *Shaw* challenge to the 2001 Plan, (*see, e.g.*, J.S. at 23), even though under *Hays* and *Shaw v. Hunt*, no individual voter has standing to bring such a claim.

Second, Appellants have asserted facts that demonstrate they have no injury and therefore no standing. Thus, even if Appellants' complaint is interpreted to assert that the districts in which they allegedly reside were unconstitutionally defined,[7] this Court does not have jurisdiction over Appellants' claims. The *Shaw* Court, in describing the harms associated with racial gerrymandering, recognized that representatives of districts defined by race would believe that they needed to represent only a segment of their constituency, and not their constituency as a whole. 509 U.S. at 648. Appellants assert that political gerrymandering imposes the same sort of representational injury. (J.S. at 22). However, Appellants residing in the five alleged "safe" Democratic districts (J.S. App. 44a), or in the alleged competitive district (J.S. at 30), cannot suffer from this sort of injury. *See also Bandemer*, 478 U.S. at 140 ("It surely cannot be an actual disadvantage in terms of fair representation on a group level just to be placed in a district with a supermajority of other Democratic voters. . . ."). Those Appellants have no standing.

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7. Appellants reside in District 1, 5, 7, 9, 10, 11, 13, 14 or 15. No Appellant resides in District 2, 3, 4, 6, 8 or 12. (J.S. App. 27a-29a).

Moreover, Appellants allege in their Second Amended Complaint that "Members of Congress from Michigan respond to constituent requests for assistance and will listen to constituents' expressions of views regardless of the party affiliation of the constituent involved. . . ." (J.S. App. 47a). This negates any argument that any Appellant suffers the representational harms identified in *Shaw*. Thus, Appellants have alleged facts that defeat a showing that they have standing to bring a *Shaw* "political gerrymandering" claim, even if such a claim exists under the Constitution.

B. The District Court's Orders Should Be Summarily Affirmed

If this Court finds it has jurisdiction over Appellants' claims, it should summarily affirm the district court's judgments. The district court properly concluded that Appellants' complaints should be dismissed because Appellants failed to allege facts that would, if proved, lead to the conclusion that the 2001 Plan violates the Constitution. Because dismissal is dictated by *Bandemer* and other Supreme Court rulings, summary affirmance is warranted. This Court has viewed summary affirmance as the proper disposition of cases presenting substantially similar claims. *See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *judgment aff'd*, 506 U.S. 801 (1992); *Anne Arundel Republican Central Committee v. State Admin. Bd.*, 781 F. Supp. 394 (D. Md. 1991), *judgment aff'd*, 504 U.S. 938 (1992); *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *judgment aff'd*, 488 U.S. 1024 (1989).

1. Appellants' Allegations Fail To Meet *Bandemer*'s Threshold

Appellants challenge the district court's dismissal of their *Bandemer* claim, contending that the court set a standard so high that no major party could ever demonstrate unconstitutional

political gerrymandering. (J.S. at 11). Because the district court plainly followed *Bandemer* and correctly dismissed Appellants' claim, its judgment should be summarily affirmed.

a. Allegations Of Disproportionate Representation Are Insufficient To State An Equal Protection Claim

Appellants take issue with the district court's ruling that, in addition to disproportionate representation, Appellants had to allege other harms from the 2001 Plan in order to state an equal protection claim. (J.S. at 2-3). The *Bandemer* plurality made clear that allegations of disproportionate representation, by themselves, are insufficient to make out an equal protection violation. *See* 478 U.S. at 132 ("[T]he mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."). Instead, additional "indicia" of "the lack of political power and the denial of fair representation" are required:

> In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. . . . In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected) of disproportionate results appears *in conjunction with similar indicia*.

Bandemer, 478 U.S. at 139-40 (emphasis added); *see also id.* at 143 n.21 ("[W]e do not share Justice O'Connor's apparent lack of faith in the lower courts' abilities to distinguish between disproportionality *per se* and the lack of fair representation that continued disproportionality *in conjunction with other*

indicia may demonstrate." (emphasis added)). In requiring that Appellants set forth allegations of effects beyond disproportionate representation, the district court followed *Bandemer*'s clear teaching.

Under *Bandemer*, the proper inquiry, which "is of necessity" a difficult one, 478 U.S. at 143, is whether the "electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. In order to state a claim, plaintiffs can allege, *in addition to disproportionate representation*, that elected candidates "will entirely ignore the interests of" voters casting their ballots for the losing candidate, *id.* at 132, that those voters "have no hope of doing any better in the reapportionment that would occur" after the next census, *id.* at 135-36; or other facts that support the conclusion that certain voters have been shut out of the political process. *Id.* at 139. These are the precise sorts of allegations that the district court granted Appellants leave to make in a future complaint. (J.S. App. 13a). No such additional indicia were alleged in their Second Amended Complaint. Because Appellants again failed to state an equal protection claim, the district court properly dismissed that complaint with prejudice. (J.S. App. 21a-22a).

b. Allegations Of "Extremely Disproportionate Results" Are Insufficient To State An Equal Protection Claim

Appellants contend that they have stated an equal protection claim, noting their complaints allege that the 2001 Plan "will generate extremely disproportionate results." (J.S. at 15). Thus, according to Appellants, they state an equal protection claim because they assert not only disproportionate representation, but "extreme" disproportionate representation.

Appellants allege that there are nine safe Republican seats in the 2001 Plan, and that Republican candidates can be expected to win nine, if not ten, of Michigan's fifteen seats. They do not point out that with fifteen seats, either Republicans or Democrats may be expected to win eight seats if the state is, as Appellants allege, a politically competitive state that has leaned Democratic or Republican depending on the decade or the election. Appellants' alleged "extremely disproportionate results" may thus translate to as few as one representative.[8]

But Appellants do not look at the number of representatives at issue in this case. Instead, they urge that *Bandemer* stands for the proposition that state legislatures may not consign a majority to minority status.[9] As a result, Appellants assert, a congressional districting plan that is predicted to result in one party's candidates winning fewer than 50% of the apportioned seats, even though that party receives more than 50% of the total statewide vote, is unconstitutional where the deviation between the two percentages is large enough, *i.e.*, where the plan does not reflect a "minor departure" from a "reasonable norm." (J.S. at 15-16).

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8. This is also indicated by Appellants' proffered alternative plans, two of which they suggest will result in eight Republicans and seven Democrats being elected. (J.S. App. 48a-49a).

9. Application of *Bandemer*'s focus on minority voice and minority status is a bit difficult in the context of congressional districting. While it may be argued that one of the concerns of the *Bandemer* plurality was that a party in power not relegate a majority of voters to minority status in a state legislative body, "minority status" in the U.S. House of Representatives necessarily depends on the votes of individuals in all fifty states, and thus is beyond the control of one state's legislature. As a result, even though after the 2000 elections Democrats comprised the majority of Michigan's congressional delegation, those Democrats are part of the minority in the House, as Republicans currently hold the majority of seats in that body.

What is large enough? Appellants suggest that because the difference between the seats and vote percentages they predict will occur under the 2001 Plan is larger than the difference that existed under the plan examined in *Bandemer*, the 2001 Plan is an example of the more egregious partisan gerrymandering that violates the Equal Protection Clause. (J.S. at 16). The plan examined in *Bandemer* resulted in an 8.9 percentage point difference between seats and statewide vote percentages (one party obtained 51.9% of the statewide vote and 43% of the seats). Under Appellants' view, nine seats for Republicans (and thus 40% of the fifteen seats for Democrats) means that the 2001 Plan is an example of unconstitutional political gerrymandering because Democrats are alleged to get more than 50% of the statewide vote. With more than 50% of the statewide vote, (*e.g.*, 51%) and with 40% of the seats, a difference greater than *Bandemer*'s 8.9 percentage points would result.

To accept Appellants' view would be to constitutionally require adoption of congressional districting plans that produce proportionate representation. For example, in a state apportioned three representatives in which Democrats receive (say) 51% of the statewide vote, a congressional districting plan would have to be declared invalid under Appellants' interpretation of *Bandemer* unless Democrats won two seats. This is because a Democratic candidate winning only one of three seats would yield a difference between the percentage statewide vote (51%) and the percentage of seats won (33.3%) of 17.7 percentage points — a difference much greater than *Bandemer*'s 8.9 percentage points. To avoid this result, the state's legislature would have to enact a plan that guaranteed to the extent possible that Democrats won two seats — a plan that limited the effect of forces, such as simple geography and the concentration of population in only a small corner of the state, that contribute to only one Democrat winning a congressional seat.

Thus, Appellants' argument is nothing more than a contention that the Constitution mandates proportionate representation, an argument this Court has repeatedly rejected. *See Bandemer*, 478 U.S. at 130 ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."). The district court's rejection of Appellants' arguments was proper and should be affirmed.

c. Appellants Seek To Avoid *Bandemer*'s High Threshold

In challenging the district court's dismissal of their equal protection claim, Appellants do not urge this Court to "enforce" *Bandemer*. Instead, Appellants seek to have this Court *lower* the standard defined in *Bandemer* so that a showing of disproportionate representation will make out a claim of unconstitutional political gerrymandering. (J.S. at 2-3 [criticizing lower courts' requirement that more than disproportionate representation be alleged and asserting that this requirement renders partisan gerrymandering "immune from legal challenge in actual practice"]).

The effect of accepting Appellants' contention is plain. Under Appellants' view, and given the alleged facts in this case, voters should be able to challenge successfully a legislatively enacted congressional districting plan even though

(1) their preferred political party has a "realistic possibility" of gaining control of the state's house and/or senate, and thus has the ability to affect whether a more favorable plan is enacted after the next census (J.S. App. 46a);

(2) their preferred political party does not lack political power in the state or in the nation as a whole;

(3) they have alternative means of influencing the political process (*e.g.*, they have two senators of their preferred party in Washington); and

(4) they have the "opportunity to influence" their elected representatives, *Bandemer*, 478 U.S. at 132, as those representatives are acknowledged to "listen to constituents' expressions of views regardless of the party affiliation of the constituent involved. . . ." (J.S. App. 47a).

In short, acceptance of Appellants' position will reduce *Bandemer*'s test to precisely what the *Bandemer* plurality explicitly rejected, *Bandemer*, 478 U.S. at 133 – a test that looks for any effect on a voter's opportunity to elect a representative of one's choice.

d. *Bandemer*'s Test Properly Limits Federal Court Involvement In States' Redistricting Decisions

This Court has long recognized that redistricting is an inherently political process, *Bandemer*, 478 U.S. at 129 n.10; *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) ("Politics and political considerations are inseparable from districting and apportionment."); and that legislatures will inevitably consider political affiliation in drawing district lines, *Bandemer*, 478 U.S. at 128; *Gaffney* at 753 ("The reality is that districting inevitably has and is intended to have substantial political consequences."). That the party in power will commonly enact a plan that protects and even enhances its own position has also been recognized. *See Bandemer*, 478 U.S. at 164 (Powell, J. dissenting) ("The term 'gerrymandering' . . . is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls."). Given the inherently political nature of redistricting decisions, the *Bandemer* plurality set a high threshold for plaintiffs asserting

unconstitutional political gerrymandering. *See Bandemer*, 478 U.S. at 134 (noting that the effects of a challenged plan must be "sufficiently serious to require intervention by the federal courts"). The *Bandemer* plurality viewed its test as appropriate given the inherently legislative and political task of redistricting. *Id.* at 143 ("[W]e believe [our test] recognizes the delicacy of intruding on this most political of legislative functions. . . .").

The *Bandemer* plurality's "heightened effect" requirement, 478 U.S. at 142 n.19, serves a clear purpose: it limits the occasions on which federal courts are forced to scrutinize the districting decisions of state legislatures — decisions that this Court has repeatedly held are primarily for state legislatures, not the federal courts, to make. *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts."); *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978) ("The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination.'" quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State . . . rather than of a federal court."); *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (recognizing that the primacy of state legislative districting decisions exists with respect to congressional districting as well). The *Bandemer* plurality's concern in rejecting as sufficient claims such as Appellants' was that

> such a low threshold for legal action would invite attack on all or almost all reapportionment statutes.

> District-based elections hardly ever produce a perfect fit between votes and representation. . . . Inviting attack on minor departures from some supposed norm would too much embroil the [federal] judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience.

Bandemer, 478 U.S. at 133-34.

The fact that few district courts applying *Bandemer* have found that plaintiffs state a claim of unconstitutional political gerrymandering is not, as Appellants assert, an indication that courts have undermined *Bandemer*'s holding.[10] It is, if anything, an indication that courts are being true to this Court's repeated admonition — in *Bandemer* and in other cases — that redistricting is an area into which courts should intrude only in the most serious of circumstances. Given this Court's recognition that politics and redistricting are inseparable, *see, e.g.*, *Gaffney*, 412 U.S. at 752, acceptance of Appellants' position would only work to involve courts in redistricting to an even greater extent than they are today.

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10. The Fourth Circuit in *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 958 (4th Cir. 1992), held that plaintiffs' complaint alleged facts sufficient to withstand a Rule 12(b)(6) motion. The Fourth Circuit noted that its decision was compelled by "the confluence of the alleged facts, including the unique claim of a near century-long dearth of political diversity among superior court judges in North Carolina, and the certainty of a similar future," and stated its belief that "if [the Republican Party of North Carolina] had alleged even a modicum of electoral success or access to the political process, its claim might not have withstood a challenge under Rule 12(b)(6)." *Id.*

Because the district court properly dismissed Appellants' equal protection claim, its judgment should be affirmed.

2. *Shaw v. Reno* Is Inapplicable To Political Gerrymandering Claims

In a further attempt to avoid *Bandemer*'s heightened effect requirement, Appellants contend that principles announced in the racial gerrymandering cases of *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), are equally applicable to claims asserting political gerrymandering. Despite the Legislature's statements that it intended to follow (J.S. App. 77a) and did follow (Motion App. 37a) neutral redistricting criteria, Appellants urge that they have asserted an equal protection claim because they allege that the Michigan Legislature abandoned neutral redistricting criteria and deliberately drew lines on the basis of political party affiliation. (J.S. at 24). This Court's jurisprudence, including its decisions in *Shaw* and *Miller*, demonstrates conclusively that Appellants are mistaken: There is no viable "*Shaw*" political gerrymandering claim under the Equal Protection Clause. The district court properly rejected Appellants' contentions to the contrary.

a. *Shaw v. Reno* And *Miller v. Johnson*

In *Shaw*, this Court faced an assertion that the "deliberate segregation of voters into separate districts on the basis of race violated [appellants'] constitutional right to participate in a 'color-blind' electoral process." 509 U.S. at 641-42. The Court — and the appellants — recognized that those responsible for districting could be *conscious* of race, but ultimately the Court held that

> a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into

> different districts on the basis of race, and that the separation lacks sufficient justification.

Id. at 649. The Court agreed that redistricting legislation that is "unexplainable on grounds other than race" demands the strict scrutiny applied to other classifications on the basis of race. *Shaw*, 509 U.S. at 644. Underlying the Court's holding was the centrality of the Equal Protection Clause's prohibition on purposeful discrimination on the basis of race. *Id.* at 642.

In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court described how this new "*Shaw*" claim might be made out. A plaintiff's burden, according to the *Miller* Court:

> is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.

Miller, 515 U.S. at 916. If a plaintiff makes this showing, strict scrutiny is applied and the burden shifts to the State to demonstrate that the legislation is narrowly tailored to achieve a compelling interest. *Id.* at 920.

b. There Is No *Shaw* Political Gerrymandering Claim

The principles laid out in *Shaw* and in *Miller* are inapplicable to Appellants' political gerrymandering claims. First, Appellants' claims are fundamentally vote dilution claims — as the district court noted, Appellants assert disproportionate representation "in abundance." As the *Miller* Court specifically noted, a *Shaw* claim is *not* a vote dilution claim:

> *Shaw* recognized a claim "analytically distinct" from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.

Miller, 515 U.S. at 911 (internal quotation marks and citations omitted); *see also Shaw v. Reno*, 509 U.S. at 649-50 ("Classifying citizens by race . . . threatens special harms that are not present in our vote dilution cases. It therefore warrants different analysis.").

Second, as classifications, race and political affiliation are not on the same footing. "Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their

membership in a racial group and to incite racial hostility." *Shaw v. Reno*, 509 U.S. at 643 (internal quotations and citations omitted); *see also id.* at 648 (describing that representatives of districts defined by race would believe that they needed to represent only a segment of their constituency, and not their constituency as a whole as a harm associated racial gerrymandering). No such statement can be made with respect to classifications based on political party affiliation. *See Bandemer*, 478 U.S. at 132 ("[W]ithout specific supporting evidence, a court cannot presume . . . that those who are elected will disregard the disproportionately underrepresented group.").

Third, Appellants' assertion that unconstitutional political gerrymandering occurs when political factors predominate over "traditional districting principles" was rejected in *Bandemer*, 478 U.S. at 138 (rejecting the notion that "the intentional drawing of district boundaries for partisan ends *and for no other reason* violates the Equal Protection Clause in and of itself" (emphasis added)). Nothing in this Court's jurisprudence suggests that *Bandemer*'s conclusion has since been overturned.

In fact, although defining district lines on the basis of race forms the basis of a *Shaw* claim, defining district lines on the basis of political affiliation has been explicitly upheld by the Court. In *Gaffney*, 412 U.S. at 752, for example, the Court described that "virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties. . . ." Nonetheless, the Court held the challenged plans did not violate the Fourteenth Amendment. *Id.* at 752-53.

Finally, there is no support for Appellants' assertion that the strict scrutiny applicable to racial classifications under *Shaw* and *Miller* is also applicable to their political gerrymandering

claim. (J.S. at 22). The *Shaw* Court, made clear that strict scrutiny was *not* applicable in the political gerrymandering context:

> [N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race, — would seem to compel the opposite conclusion.

Shaw, 509 U.S. at 650 (internal citations omitted); *see also Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny.").[11]

In short, this Court has not considered a legislature's classification on the basis of political party affiliation — even if it is the sole criterion in redistricting — to be a violation of the Fourteenth Amendment. There is no "*Shaw* political gerrymandering claim" under the Equal Protection Clause, and Appellants' arguments to the contrary should be rejected. The district court did precisely this, and as a result, its decision should be affirmed.

3. Article I Neither Prohibits Safe Districts Nor Mandates Political Neutrality

Appellants assert that the 2001 Plan is unconstitutional under Article I, but do not allege that the Plan fails to meet Article I, § 2's equality of population requirement.[12] Instead,

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11. Nowhere in *Gaffney* did the Court indicate that, given clear evidence of an intent to draw lines on the basis of political party affiliation, it was subjecting the challenged plans to strict scrutiny.

12. Fourteen of the 2001 Plan's fifteen districts have a population of 662,563; the last has a population of 662,562. (J.S. App. 78a).

they assert that voters have a cause of action under Article I, § 4, the Elections Clause, because Article I requires that state legislatures follow a principle of political neutrality in redistricting (J.S. at 29), and does not authorize states to enact plans that produce safe districts and that "frustrate[] the majority's will." (J.S. at 30). To support their argument, Appellants look to *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and *Cook v. Gralike*, 531 U.S. 510 (2001), cases that have nothing to do with redistricting or with claims of vote dilution.[13]

Appellants misinterpret Article I. First, as a grant of authority to states, the Elections Clause does not provide *voters* with rights not elsewhere protected. In both *U.S. Term Limits* and *Cook*, Article I, § 4 was raised by the state as a *defense* to plaintiffs' challenges, *i.e.*, the state asserted that Section 4 granted it the authority to undertake the challenged action. In neither case was Article I, § 4 the source of a constitutional right plaintiffs sought to protect.

Second, as Appellants acknowledge, (J.S. at 25), the Elections Clause authorizes the Michigan Legislature to enact statutes defining congressional districts and otherwise regulating congressional elections. *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that [the Elections Clause's] comprehensive words embrace authority to provide a complete code for congressional elections, ..."). This fact alone

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13. Appellants have not pointed to any aspect of the 2001 Plan that denies certain candidates access to the ballot, *U.S. Term Limits*, 514 U.S. at 836, or to any aspect of the Plan that is remotely equivalent to the provision struck down in *Cook*. *See Cook v. Gralike*, 531 U.S. at 528 (Kennedy, J., concurring) (describing the challenged provision as one that "handicap[s] those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred position on a certain issue").

distinguishes this case from *U.S. Term Limits* and *Cook*. In neither case was the state's action found to be a procedural regulation of congressional elections. *See U.S. Term Limits*, 514 U.S. at 832-35 (rejecting the contention that the challenged provision defining term limits was a regulation of the manner of elections); *Cook*, 531 U.S. at 523 (determining that the state constitutional provision at issue was "not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections").

Third, contrary to Appellants' contention, there is no constitutional mandate that state legislatures be blind to politics in congressional redistricting. In fact, this Court has explicitly recognized the impossibility of such a requirement:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

Gaffney, 412 U.S. at 753. Because it is likely that the political impact of any plan will be known at the time it is adopted, the only way that a state could avoid Appellants' charge of unconstitutional political gerrymandering (or unconstitutional frustration of the will of the majority) is to ensure that only plans that result in proportionate representation are adopted. Again, Appellants' arguments reduce to an assertion — repeatedly rejected by the Court — that the Constitution mandates proportionate representation.

Moreover, as the *Bandemer* plurality recognized, ensuring proportionate representation *requires* consideration of political factors and the creation of safe seats:

> To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this 'political fairness' approach in *Gaffney v. Cummings*, despite its tendency to deny safe district minorities any realistic chance to elect their own representatives. But *Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.

Bandemer, 478 U.S. at 130-31. In short, ensuring proportionate representation requires consideration of political factors and the creation of safe seats (*i.e.*, the dictating of election outcomes) — the precise acts that Appellants urge the Constitution forbids in the redistricting context.

Appellants' assertion that Article I requires something close to an absolute political neutrality standard is thus baseless.[14] The Constitution imposes no "political neutrality" mandate on congressional districting. This Court recognized in *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Hunt I*"), that "constitutional political gerrymandering" (*i.e.*, that which was valid under *Bandemer*) was a traditional race-neutral principle

14. Under the test set forth in *Karcher v. Daggett*, 462 U.S. 725 (1983), questions regarding what a state legislature considered in adopting a congressional districting plan are raised *only* if Article I, § 2's population equality standard is *not* met. *Id.* at 730-31. Thus, if, as here, that standard *is* met, Article I is *indifferent* to the criteria, including political party affiliation, that the legislature may have applied.

that could be applied in fashioning congressional districts.[15] Nor does the Constitution forbid, under *U.S. Term Limits*, the legislature's creation of safe seats. *See, e.g., Hunt v. Cromartie*, 532 U.S. 234 (2001) ("*Hunt II*") (upholding congressional districting plan in which legislature intentionally created a strong Democratic district).

This Court has had numerous opportunities to restrict a state legislature's consideration of political factors in redistricting in the manner that Appellants advocate. It has not done so. This Court has not identified a constitutional mandate that state legislatures employ only "traditional districting principles" in fashioning congressional districts or otherwise concern themselves with only "neutral" considerations. Instead, it has emphasized that such criteria themselves are not constitutionally required. *See, e.g., Shaw v. Reno*, 509 U.S. at 647 (listing "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" and emphasizing that these criteria are *not* constitutionally required).

Indeed, a directive that states adhere to only neutral criteria would be nearly impossible to follow given "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 752. Courts would be faced with challenges to nearly every congressional districting plan, with each set of plaintiffs contending that politics entered into decision making to a degree that exceeds the departure from political neutrality allowed by Article I. In short, the result the *Bandemer* plurality attempted to avoid would be obtained:

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15. The Framers authorized Congress to override states' regulations. *U.S. Term Limits*, 514 U.S. at 808 ("[T]he Framers created a safeguard against state abuse by giving Congress the power to 'by Law make or alter such Regulations'."). Congress has imposed neither requirements nor limitations on the political factors states may use in congressional districting. *See* 2 U.S.C. § 2c.

> Inviting attack on minor departures from some supposed norm would too much embroil the [federal] judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience.

Bandemer, 478 U.S. at 133-34.

The district court properly dismissed Appellants' Article I claim. That result is correct under this Court's jurisprudence, and should be affirmed.

III. CONCLUSION

For the foregoing reasons, this Court should dismiss Appellants' appeal for lack of jurisdiction, or, in the alternative, summarily affirm the district court's dismissal of Appellants' equal protection and Article I claims.

Respectfully submitted,

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APPENDIX

APPENDIX A — MAP OF MICHIGAN'S 15 CONGRESSIONAL DISTRICTS 2001 Apportionment Plan

MICHIGAN'S 15 CONGRESSIONAL DISTRICTS

2001 Apportionment Plan

Produced by
Michigan Information Center
October 2001

APPENDIX B — AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN FILED SEPTEMBER 20, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, and CHRISTOPHER SMITH,

Plaintiffs,

v.

CANDICE S. MILLER, in her official capacity as Secretary of State for the State of Michigan, and CHRISTOPHER THOMAS, in his official capacity as Director of Elections for the State of Michigan,

Defendants.

AMENDED COMPLAINT

1. The plaintiffs — Pat O'Lear, Donald Rittering, Kay Ann Chase, Steve Borello, Lawrence Kestenbaum, James Larkin, Barbara Long, George Gaines, Minnie H. Whiting, and Christopher Smith — have brought this action to enforce voting rights guaranteed to them by the United States Constitution and federal law. As registered Democrats in the

State of Michigan, the plaintiffs have exercised, and wish to continue exercising, their right to vote for their preferred candidates for United States Representative. The Michigan Legislature, however, has deliberately redrawn district lines to maximize the number of Republicans likely to be elected in the 2002 congressional elections. While political concerns always play some role in the redistricting process, such partisan gerrymandering, in which partisan concerns have predominated over other traditional redistricting principles, violates Article I's requirement that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the Several States," as well as the First, Fourteenth, and Fifteenth Amendments. The congressional redistricting plan also improperly dilutes the power and influence of African-American voters in violation of the Voting Rights Act.

PARTIES

2. Plaintiff Pat O'Lear resides in Sterling Heights city in Macomb County. His address is 8104 New Bradford, Sterling Heights, Michigan 48312. Prior to the 2001 redistricting, his home was in Michigan's Twelfth Congressional District. Under the 2001 plan, it is in Michigan's Tenth Congressional District.

3. Plaintiff Donald Rittering resides in Salem township in Washtenaw County. His address is 9706 Six Mile Road, Northville, Michigan 48167. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, it is in the Seventh Congressional District.

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4. Plaintiff Kay Ann Chase resides in Charlevoix township in Charlevoix County. Her address is 12492 Pine Ridge, Charlevoix, Michigan 49720. Prior to the 2001 redistricting, her home was in Michigan's First Congressional District. It remains in the First Congressional District under the 2001 plan.

5. Plaintiff Steve Borello resides in Saginaw city in Saginaw County. His address is 721 South Michigan Avenue, Saginaw, Michigan 48602. Prior to the 2001 redistricting, his home was in Michigan's Fifth Congressional District. It remains in the Fifth Congressional District under the 2001 plan.

6. Plaintiff Lawrence Kestenbaum resides in Ann Arbor city in Washtenaw County. His address is 1726 W. Stadium Boulevard, Ann Arbor, Michigan 48103. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Fifteenth Congressional District.

7. Plaintiff James Larkin resides in Garden City in Wayne County. His address is 1021 West Rose, Garden City, Michigan 48185. Prior to the 2001 redistricting, his home was in Michigan's Thirteenth Congressional District. Under the 2001 plan, his home is in Michigan's Eleventh Congressional District.

8. Plaintiff Christopher Smith resides in Lincoln Park city in Wayne County. His address is 950 Moran, Lincoln Park, Michigan 48146. Prior to the 2001 redistricting, his home was in Michigan's Sixteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

9. Plaintiff Barbara Long resides in Detroit city in Wayne County. Her address is 11730 Rosemont, Detroit, Michigan 48228. Prior to the 2001 redistricting, her home was in Michigan's Fourteenth Congressional District. Under the 2001 plan, her home is in Michigan's Fourteenth Congressional District.

10. Plaintiff George Gaines resides in Detroit city in Wayne County. His address is 1531 Chateaufort, Detroit, Michigan 48207. Prior to the 2001 redistricting, his home was in Michigan's Fifteenth Congressional District. Under the 2001 plan, his home is in Michigan's Thirteenth Congressional District.

11. Plaintiff Minnie H. Whiting resides in Pontiac city in Oakland County. Her address is 137 E. Iroquois, Pontiac, Michigan 48341. Prior to the 2001 redistricting, her home was in Michigan's Ninth Congressional District. Under the 2001 plan, her home is in Michigan's Ninth Congressional District.

12. Defendants are Candice S. Miller, the Secretary of State for the State of Michigan, and Christopher Thomas, the Director of Elections for the State of Michigan. Both defendants are sued in their official capacities.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202 and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

Appendix B

BASIS OF CLAIMS

14. On July 11, 2001, on a straight party-line vote in the Michigan Senate and an almost straight party-line vote in the Michigan House of Representatives, the Republican majorities in Michigan's legislative chambers passed a congressional redistricting plan ("the Republican Plan") that will radically alter the partisan balance of Michigan's congressional delegation. At present, Michigan has nine Democratic and seven Republican Representatives in Congress. Under the new plan, Michigan is likely to have only five or six Democratic Representatives and nine or ten Republican Representatives. (As a result of the 2000 census, Michigan is now entitled to only fifteen congressional seats). Thus, based entirely on redrawing of district lines, the number of Democratic Representatives is likely to decrease by at least one-third.

I. *The Republicans Violated State Law In Order to Pass A Partisan Gerrymander.*

15. In passing the Republican Plan, the Republicans deviated from the nonpartisan criteria they themselves had helped to establish when they passed the Congressional Redistricting Act of 1999, P.A. 221. Because they could not achieve their desired partisan ends consistent with these criteria, the Republicans "reinterpreted" these criteria in the legislation that included the Republican Plan. This "reinterpretation" violated the Michigan Constitution's mandate that no Act shall take effect immediately unless passed by a two-thirds vote of each house. Mich Const., art. 4, § 27 ("No Act shall take effect until the expiration of 90 days from the end of the

session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."). It also violated the rule against amendment by reference ("No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Mich Const, art 4, § 25) and the "two subject rule" ("No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Mich Const., art. 4, § 24). The Legislature's willingness to violate the Michigan Constitution underscores the extent to which the Republican Plan was based on partisan considerations.

16. In 1999, the Republicans controlled both houses of the Michigan Legislature, as well as the governorship. As will be set forth below, however, the Republicans understood that Michigan was becoming increasingly Democratic and thus there was a significant chance that Democrats would control at least one legislative chamber at the time of redistricting in 2001. They therefore passed the Congressional Redistricting Act to limit the role of partisan considerations in redistricting. The Act established very specific criteria for congressional redistricting in addition to compliance with federal law. It prioritized those criteria and placed at the top of the priority list that "[e]ach congressional district shall consist of areas of convenient territory contiguous by land," and, after contiguity, that "[c]ongressional district lines shall break as few county boundaries as is reasonably possible." Mich. Comp. Laws § 3.63(c). The Act also provided, further down

the priority list, that "[c]ongressional district lines shall break as few city and township boundaries as is reasonably possible." *Id.* The complete text of the statute is attached as Ex. A.

17. The Republican Plan violates these criteria by breaking ten county boundaries and fourteen city or township boundaries when it is "reasonably possible" to draw an alternative redistricting plan that breaks only five county boundaries and ten city or township boundaries. During the legislative session, Democrats introduced a plan that breaks only five county boundaries and ten city or county boundaries. Unlike the Republican Plan which pairs six Democratic incumbents in three districts, this plan does not pair in the same district any incumbents seeking reelection and more accurately reflects the political makeup of the State. (One Democratic incumbent intends to run for Governor, so only fifteen incumbents — eight Democrats and seven Republicans — are seeking reelection.) Nonetheless, this alternative plan was defeated on the floor of the House on July 11, 2001, on a party-line vote (with the exception of one Republican who joined Democrats in supporting the plan).

18. In 1999, when the Legislature passed the Congressional Redistricting Act, it believed that this Act would bind the 2001 Legislature that would control redistricting. As explained above, the Michigan Constitution forbids implementation of legislation until 90 days after conclusion of a legislative session, in the absence of a two-thirds vote. Thus, without a two-thirds vote, the 2001 Legislature could not change the 1999 criteria for enacting a redistricting plan and immediately use those criteria as the basis for enacting a new redistricting plan. Even if the Legislature changed the criteria, the 1999 criteria would apply to 2001 redistricting efforts.

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19. Nonetheless, because the Republican Plan clearly violates the statutory criteria set forth in the Congressional Redistricting Act, the 2001 Legislature redefined those criteria under the guise of interpretation. The legislation that includes the Republican Plan first states that "[i]t is the intention of the Legislature to comply fully with section 3 of the Congressional Redistricting Act, 1999 P.A. 221, MCL 3.63," which requires congressional district lines to break as few county boundaries (and as few city or township boundaries) as possible. But it then defines the number of county breaks in the redistricting plan as follows:

> (i) Breaking a county line means assigning part of the population of a county to 1 or more counties in the formation of a district.
>
> (ii) If population is shifted from a county to a single election district, including a district from 2 geographically-separate areas, there is 1 break. Except as provided in subparagraph (iii), if population from a county is shifted to 2 or more election districts, there are 2 or more breaks.
>
> (iii) If 1 part of a county is shifted to a district and the rest of the county is shifted to another district, there is 1 break.

To the extent they are comprehensible, these provisions appear to have been designed to justify the Republican Plan and thus must have been intended to govern the enactment of that very Plan. In other words, they were intended to have immediate effect. But the Republicans knew that they did

not have the two-thirds majority needed for immediate implementation of the new criteria, and indeed, a Senate vote on whether the legislation should have immediate effect failed to garner the necessary two-thirds vote. The Republicans therefore attempted to circumvent the constitutional requirement for such a two-thirds vote by labeling the new statutory criteria as merely an "interpretation" of existing criteria. Yet the new provisions do not merely interpret the 1999 Act's redistricting criteria; they completely change them and thus required a two-thirds vote that they did not receive. The new redistricting criteria were therefore not in effect when the Republicans enacted the Republican Plan. The 1999 criteria were controlling.

20. The Republicans' willingness to deviate from the non-partisan redistricting criteria they enacted in 1999 and to circumvent the Michigan Constitution in the process demonstrates that partisanship was the dominant motivation for the Republican Plan. This is also shown by the Republicans' willingness to violate the constitution in other ways. Passage of new redistricting criteria in the same legislation as a redistricting plan, without re-publication of existing redistricting criteria, violates Michigan's constitutional rules, set forth above, against amendment by reference and inclusion of two subjects in the same law.

II. *The Republicans Were Unwilling To Subject Their Redistricting Plan To Public, Or Legislative, Deliberation.*

21. The partisan motivation for the Republican Plan is further emphasized by the manner in which that plan was shepherded through the Legislature with little opportunity

for evaluation or for presentation of alternative plans. When the Michigan Legislature passed the Congressional Redistricting Act in 1999, it understood the importance of careful deliberation and public input during the redistricting process. It therefore provided that the Legislature "shall enact a redistricting plan for congressional districts" "[n]ot later than *November 1, 2001*." Mich. Comp. Laws § 3.62 (emphasis added). The November 1, 2001 deadline allowed seven months for careful deliberation after receipt of the 2000 census data (which, by federal law, must take place by April 1), while still ensuring that any courts reviewing the redistrict-ing plan would have sufficient time to consider that plan and devise an alternative, if necessary, before the 2002 congressional election cycle gets underway.

22. Michigan law further emphasizes the importance of deliberation and public input in the redistricting process by building in a public comment period during the state judicial phase of the redistricting process. In particular, the law provides that in the event the Legislature is unable to agree on a redistricting plan, the Michigan Supreme Court shall propose a plan for public consideration and "make that plan available for public inspection at least 30 days before the time set for [a] hearing." Mich. Comp. Laws § 3.74.

23. Federal law also requires a deliberative process. The Voting Rights Act of 1965 prohibits enactment of any redistricting plan that would abridge the right to vote based on race or ethnicity. In reviewing a Michigan redistricting plan under the Voting Rights Act, the Justice Department (or the District Court for the District of Columbia) will consider the "extent to which the [Michigan Legislature] followed objective

guidelines and fair and conventional procedures" in enacting the new map, the "extent to which the [Legislature] afforded members of racial and language minority groups an opportunity to participate" in the decision-making process, and the "extent to which the [Legislature] took the concerns of members of racial and language minority groups into account." 28 C.F.R. § 51.57. A process that departs from normal legislative procedures and excludes African-Americans and other minorities from full participation risks rejection by the Justice Department or D.C. District Court.

24. Initially, the Republicans appeared to understand the value that Michigan and federal law places on deliberation and public participation in the redistricting process. When the census data were released in March 2001, the Republican leadership of the Michigan Legislature announced a "framework for redistricting" that included "public hearings across Michigan this summer, with the goal of passing a redistricting plan in the fall." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Michigan 2000 Census Figures Released: New Legislative Districts to be Developed" (Mar. 28, 2001) (quoting Sen. DeGrow and Sen. Schuette). This schedule provided sufficient time for presentation of alternative plans and reasoned consideration of these plans while nonetheless ensuring that a redistricting plan could be adopted by the Legislature and upheld by the courts well before the congressional candidates would have to file for the 2002 congressional elections.

25. The Republican leadership later abandoned its proposal for a deliberative process, and instead announced on Friday, June 8, that "organizations and/or interested persons have

until noon, Monday, June 18 to submit prepared plans, voting data, or legal analyses relevant to legislative and congressional redistricting." Press Release from the Office of Senate Majority Leader Dan L. DeGrow, "Legislative Redistricting Input Sought" (June 8, 2001) (quoting Sen. DeGrow and Sen. Schuette). The Senate Majority leadership later granted a one-week extension — until noon on June 25 — for submission of plans. Even with this additional week, there was still very little time for interested parties to engage in the complicated process of drawing maps and ensuring that they complied with all of the necessary legal requirements.

26. Not only did the Republican leadership provide little time for submission of alternative redistricting plans, it provided others little time for consideration of its own plan. When the Republicans first introduced a redistricting bill, on June 14, 2001, they introduced a shell bill that eliminated old congressional-district lines without proposing any new districts. *See* Senate Bill 546 (as introduced, June 14, 2001). The bill was referred to the Committee on Reapportionment that same day.

27. The Republicans did not publicly release the Republican Plan until 1:00 p.m. on June 25, 2001 — *after* the artificial deadline established by the Senate Majority leadership for introduction of plans had expired. The Republicans introduced the plan on the afternoon of June 25 even though the map was likely available far earlier. The Republican staff person who drew the map testified to the Senate Reapportionment Committee that she did so before political data were loaded onto the State's redistricting computers. Since these

data were loaded in April 2001, her testimony suggests that she drew the map at least two months before it was publicly released.

28. On June 25, the Senate Committee on Reapportionment held the first and only hearing at which it discussed specific congressional maps, and it was at this hearing that the Republicans introduced the Republican Plan. The Committee ensured there would be little public participation at this hearing by waiting until the afternoon of Friday June 22 to call the hearing. As a result, the only public participant at the hearing was the Executive Director of the Detroit Chapter of the National Association for the Advancement of Colored People ("NAACP").

29. The Republicans further limited public participation — and analysis of the Republican Plan by the public or by Democrats — through the manner in which they presented the bill. The bill did not include a pictorial representation of the proposed districts. Instead, the bill consisted of a list of counties, cities, and or townships in each district. When only part of a city or township was included in a district, the bill designated the included areas based on the six-digit census-tract numbers and four-digit census-block numbers of those areas. The bill was 167 pages long. Thus, the exact boundaries of each district could only be determined by analyzing thousands of census tract and block numbers — a task that is virtually impossible without a computer.

30. The Senate Republicans refused to provide the proposed map in electronic form even after they were asked to do so. Thus, before the map could he analyzed, the thousands of

block numbers had to be manually entered into a computer. Not surprisingly, the Republicans' desire to preclude Democrats and the public from readily analyzing the Republican Plan, and their resultant unwillingness to provide the map in electronic form, resulted in two major mistakes that were not discovered until after both the Senate and House had already passed the Plan, as is set forth below. In other states, it is routine practice for maps to be provided in electronic form to legislators from both political parties — and even to be placed on the World Wide Web for public inspection.

31. The NAACP asked for a 30-day extension to evaluate the map. This request was rejected.

32. The Committee voted in favor of the plan on June 25, 2001, and the full Senate voted to pass the proposed plan on June 26, 2001. Thus, the Senate passed the Republican Plan only a day after it was first introduced. Both in committee and on the floor, votes divided perfectly along party lines, with Republicans voting in favor and Democrats in opposition.

33. The bill moved to the House, where the Committee on Redistricting and Elections met on July 10, 2001, to consider the Senate plan. The House had only one day to consider the plan and reach an agreement with the Senate, as the legislative session was scheduled to end on July 11, 2001. Committee hearings and floor debate were minimal. The Committee heard limited testimony at its July 10 hearing, all of it in opposition to the Republican Plan, but it summarily ignored this testimony. The Committee Chair also summarily dismissed the questions of Democratic committee members

on the plan, by either indicating that he did not know the answers to the questions or stating that the members should obtain the answers from Democratic staff. At roughly 11:00 p.m. on July 10, the Committee voted to approve the Republican Plan on a straight party-line vote.

34. The full House considered the Republican Plan well after midnight on the morning of July 11, 2001 — not a time when public scrutiny or rigorous debate was likely to occur. At roughly 2:35 a.m., the House passed the plan on a straight party-line vote (with the exception of one Republican who joined the Democrats because the Republican Plan diluted the political influence of Dearborn's growing Arab-American population) after first rejecting two Democratic alternatives (with the same Republican again the only Representative to break party lines).

35. Later on July 11, the House asked the Senate to return the redistricting bill because it contained a blatant error. The Fifteenth Congressional District was noncontiguous: To traverse it, one would have to leave the Fifteenth and enter the Seventh Congressional District. Thus, the plan passed by both houses violated the *highest*-priority state criterion under the 1999 Congressional Redistricting Act. Democrats and members of the public did not catch the error prior to passage because the Republicans rushed the bill through the Legislature and refused to provide an electronic version of their map. Republicans did not catch the error because they were concerned predominantly with the partisan implications of the Republican Plan and apparently never even analyzed the Plan carefully to determine its compliance with the 1999 Act.

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36. When the bill containing the Republican plan was returned to it on July 11, the House amended the bill to make the Fifteenth District contiguous, again passed the bill along party lines (with the same lone Republican dissenter) and returned it to the Senate. The Senate then passed the amended bill, again dividing perfectly along party lines.

37. The bill contained another blatant error, however. Four thousand, five hundred seventy-eight (4,578) people were not placed into *any* district in the bill. Thus, the bill plainly violated the principle of one person, one vote. (The state legislative redistricting plan contained a similar but lesser error — one unpopulated census tract was not placed in any district). Once again, no legislators caught this error because of the rush to enact the Republican Plan. By the time this error became apparent, the Legislature was out of session and was not scheduled to return until September.

38. Senate Secretary Carol Viventi was therefore faced with a choice: present the Republican Plan to the Governor despite the blatant error, correct the error herself, or wait until the Legislature returned in September and then send the bill back to the Legislature for amendment. Sending the bill back to the Legislature, however, would have opened up the possibility of further debate on the Republican Plan. The Republican leadership and Governor Engler did not wish to open up any such possibility.

39. After a series of meetings with Republican leaders, Secretary Viventi concluded that she had the authority to correct the Republican Plan herself under Joint Rule 12. That rule states that, "[i]f errors are found in a bill which has

been passed by both Houses, the House in which the bill originated may make amendments to correct the errors and shall notify the other House of its action. If the corrective amendments are agreed to by the other House, the corrected bill shall be referred for enrollment printing and presentation to the Governor." Secretary Viventi apparently concluded that this Rule gave her authority to add more than four thousand people to a congressional district without the approval of either House because the correction was merely "technical" in nature. (In contrast, the Clerk of the House, who controlled presentment of the state legislative redistricting plan to the Governor, apparently concluded that Rule 12 did not provide him authority to correct the similar — but lesser — problem with the state legislative redistricting plan and did not correct that plan.)

40. On September 11, nearly two months after passage of the Republican Plan, Secretary Viventi corrected the Plan and presented it to the Governor. The Governor signed the bill containing the Republican Plan at 4:54 p.m. on Tuesday, September 11, 2001. If Secretary Viventi had waited only a couple more weeks, she could have returned the bill to the Legislature to correct the Plan itself.

41. Thus, the Republicans short-circuited the deliberative process. The passage of a plan containing two blatant and fundamental errors demonstrates how little deliberation occurred and shows that members voted on a bill the contents of which they cannot have understood. This is further underscored by the unwillingness of Republicans to open up the plan for further deliberation by correcting it through the ordinary legislative process. The Republicans passed the Plan

because they had already agreed internally on that plan and felt no need for input from Democrats or from the public. In fact, Republicans repeatedly made clear in press reports that they intended to use their control of the state legislature and governorship to pass a redistricting plan aimed to benefit Republicans. That is what they did.

III. *The Republican Plan is Severely Biased Against Democrats.*

42. In general, Michigan is a politically competitive State that leans Democratic in federal elections. Michigan has voted for the Democratic candidate for President in each of the last three presidential contests, with the Republican candidate twice failing to capture even 40% of the statewide vote. Both of its U.S. Senators are Democrats. At present, nine of Michigan's sixteen Representatives are Democrats.

43. The current makeup of Michigan's congressional delegation is not an artifact of any bias in the current congressional districting plan. The current districts were drawn in 1992 by a federal district court of three judges — Sixth Circuit Judge Ryan and District Judges Newblatt and Bell. *See Good v. Austin*, 800 F. Supp. 551(E.D. & W.D. Mich. 1992). In the most recent elections conducted under that plan, in November 2000, the Democratic congressional candidates received nearly 400,000 more votes than their Republican opponents (54.8% to 45.2% of the major-party vote) and that closely approximates the number of congressional seats they control (9 out of 16 seats is 56.3%).

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44. The Michigan electorate has been trending Democratic in recent years. In 1996, Democrats carried the statewide congressional vote by seven percentage points (53.5% to 46.5%). In the 2000 elections, the margin was more than nine percentage points. In 1996 and 2000, the Democratic presidential candidates won by nearly five points more in Michigan than elsewhere in the country. In contrast, in 1984 and 1988, the Republican presidential candidates had won Michigan and had done so by larger margins than they did nationwide.

45. Despite the increasingly Democratic nature of the Michigan electorate in national elections, under the Republican Plan, Republicans are very likely to win nine or even ten of the fifteen congressional seats. This is apparent from analyzing the results of past elections based on the districts drawn in the Plan. Democratic presidential candidate Al Gore carried Michigan by approximately five points statewide. Thus, in a non-partisan redistricting plan, Al Gore would have carried slightly over half the congressional districts. Yet Republican presidential candidate George W. Bush carried ten of the fifteen congressional districts drawn in the Republican Plan. This is because the maximum number of Democrats were packed into just five districts — each of which Al Gore carried by at least 23 points. In contrast, under the court-drawn congressional districting plan put in place in 1992 ("the 1992 Plan"), Al Gore carried ten of sixteen congressional districts, far more accurately reflecting the percentage of the statewide vote that he won.

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46. Similarly, while Democratic senatorial candidate Debbie Stabenow won the U.S. Senate race in 2000 with just over half of the major-party statewide vote, she would have carried only five of the fifteen congressional districts under the Republican Plan — not surprisingly, the same five districts that Al Gore would have carried. In contrast, she would have carried nine out of sixteen districts under the 1992 Plan — a result consistent with her narrow victory statewide.

47. The partisan nature of the Republican Plan is also reflected in the pairing of current incumbents. While all seven Republican incumbents reside in separate districts under the Republican Plan, six of the nine Democratic incumbents are paired against each other. Congressman John Dingell of Dearborn and Congresswoman Lynn Rivers of Ann Arbor both reside in the new Fifteenth District. Congressman Dale Kildee of Flint and Congressman James Barcia of Bay City both reside in the new Fifth District. And Congressman David Bonior of Mount Clemens and Congressman Sander Levin of Royal Oak both reside in the new Twelfth District. (Congressman Bonior has announced his intention to retire from Congress and run for Governor.)

48. Thus, although there are currently nine Democratic incumbents and seven Republican incumbents, under the Republican Plan only six districts contain the homes of Democratic incumbents. Seven districts contain the homes of Republican incumbents. Two districts (the Tenth and the Eleventh) contain the homes of no incumbents — an odd result in a State that is losing one congressional seat to reapportionment.

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49. In contrast, two nonpartisan plans introduced by the Democrats in the Michigan Legislature pair fewer incumbents, more accurately reflect the political makeup of the State, and better accord with the nonpartisan criteria set forth in the 1999 Congressional Redistricting Act. The first plan, offered on the floor of the Michigan House as the Kilpatrick substitute, breaks only five county boundaries, far fewer than the ten boundaries broken in the Republican Plan. It also pairs only two incumbents. Democrat David Bonior, who plans to retire from Congress, is paired with Republican Joe Knollenberg in a Republican-leaning district. Finally, it accurately reflects the makeup of the State's electorate. Al Gore, who carried Michigan by roughly 5 percentage points, would have won 53.3% of the districts under this plan (in contrast to 33.3% under the Republican Plan). Nonetheless, on July 11, 2001, the House rejected this plan on a straight party-line vote (with the exception of a single Republican who joined Democrats in supporting the plan).

50. The Democrats introduced a second redistricting plan that accords with the Republicans' bizarre reinterpretation of the 1999 Act. This plan breaks the same number of county boundaries as the Republican Plan, using the Republicans' unique method of counting. This plan is not partisan, however. It pairs four incumbents — two Democrats in one district and two Republicans in another — in contrast to the six Democrats and zero Republicans paired in the Republican Plan. It also more accurately reflects the political makeup of the State. Al Gore would have carried 46.7% of the districts (7 out of 15) under this plan. The House also rejected this plan on a straight party-line vote.

51. Thus, the Republicans rejected alternative plans and rammed through their own plan even though it deviated sharply from preexisting statutory criteria and required a significant revision of those criteria in violation of the Michigan Constitution. Clearly, partisan concerns predominated. As the Chairman of the House Redistricting and Election Committee Bruce Patterson explained to the *Detroit NEWS*, in April when asked if the Republicans intended to adopt a plan to create a 9-to-6 Republican majority, "If 9-6 is doable and within the rules, why wouldn't I go with that?" Mark Hornbeck & Charlie Cain, *Oakland Key to Redistricting*, DETROIT NEWS at A1, Wednesday, April 25, 2001. Indeed, the Republicans apparently believed that if 9-6, or 10-5, was "doable" they should go with that even if it was *not* within the rules.

IV. *The Republican Plan Dilutes The Voting Strength of African-American Citizens.*

52. In addition to its excessive partisanship, the Republican Plan also limits the power and influence of Michigan's one million four hundred twelve thousand African-American citizens. Outside of Wayne County, blacks in Michigan would not reside in a majority-black district under any redistricting plan but they could still have significant impact on congressional elections. However, because blacks in Michigan tend to vote as a bloc and strongly favor Democrats and because whites in Michigan tend to vote as a bloc, blacks can only have significant impact on the nomination and election of a congressman or congresswoman if (1) they reside in a competitive or Democratic-leaning district, and (2) there is a relatively high concentration of blacks among Democratic primary voters.

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53. Outside of Detroit, three of the cities with the highest number of blacks are Pontiac, Grand Rapids, and Lansing. Under the Republican Plan, each of these cities is placed in a strongly Republican district and also is isolated from other cities with a significant black population. Under the Kilpatrick substitute, however, each of these three cities is placed in a competitive or Democratic-leaning district.

54. Finally, because blacks in Michigan vote overwhelmingly for Democrats in congressional elections, the substantial diminution in Democratic strength under the Republican Plan inherently dilutes the ability of black voters to participate in the political process and to elect candidates of their choice to Congress.

CLAIM I

55. Plaintiffs incorporate by reference Paragraphs 1 through 54.

56. The facts herein alleged constitute a denial or abridgement of each plaintiff's right to vote for his or her Representative to the United States Congress, in violation of Sections 2 and 4 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment.

CLAIM II

57. Plaintiffs incorporate by reference Paragraphs 1 through 54.

58. The facts herein alleged constitute a denial of the plaintiffs' freedoms of speech and association in violation of the First Amendment to the United States Constitution.

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CLAIM III

59. Plaintiffs incorporate by reference Paragraphs 1 through 54.

60. The facts herein alleged constitute a denial to plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM IV

61. Plaintiffs incorporate by reference Paragraphs 1 through 54.

62. The facts herein alleged constitute an abridgment of the privileges and immunities of citizenship guaranteed to plaintiffs by the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM V

63. Plaintiffs incorporate by reference Paragraphs 1 through 54.

64. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed to them by Section I of the Fifteenth Amendment to the United States Constitution.

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CLAIM VI

65. Plaintiffs incorporate by reference Paragraphs 1 through 54.

66. The facts herein alleged constitute a deprivation of plaintiffs' constitutional rights that is actionable under Section 1983 of Title 42 of the United States Code.

CLAIM VII

67. Plaintiffs incorporate by reference Paragraphs 1 through 54.

68. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote as guaranteed them by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Assume jurisdiction of this matter and convene as a three-judge District Court pursuant to Section 2284 of Title 28 of the United States Code;

B. Set a deadline of April 1, 2002, pursuant to the principles of federalism and comity set forth in *Growe v. Emison*, 507 U.S. 25, 32-37 (1993), and consistent with the April 1, 2002, deadline established by Michigan law, Mich. Comp. Laws § 3.74(g), for the Michigan Supreme Court to adjudicate any challenges to the Michigan congressional redistricting plan;

C. If the Supreme Court of Michigan fails to adopt a new, legally valid congressional redistricting plan by that April 1,

2002 deadline, enter a declaratory judgment that the congressional districting plan enacted in the summer of 2001 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

D. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from conducting primary, general, or special elections using the 2001 congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

E. Impose by Court order a new congressional redistricting plan that meets the requirements the United States Constitution and federal and state law;

F. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

G. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,

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APPENDIX C — MICHIGAN BILL TEXT
HOUSE CONCURRENT RESOLUTION NO. 34

JOURNAL OF THE HOUSE [July 10, 2001]

By unanimous consent the House returned to the order of
Motions and Resolutions

Rep. Patterson offered the following concurrent resolution:
House Concurrent Resolution No. 34

A concurrent resolution to explain and urge the Governor to support and sign Senate Bill No. 546.

Whereas, During the last decade, Michigan's population grew by 643,147 people, an increase of approximately seven percent. Despite Michigan's population growth, the 2000 decennial census has resulted in Michigan being apportioned fifteen congressional seats for the next ten years, one fewer than ten years ago. Based on Michigan's population of 9,938,444, the ideal size of each congressional district is 662,563. This is an increase of 81,600 people from the ideal district size in the current congressional districting plan. In addition to a change in overall population, during the last decade, significant demographic shifts occurred in the state. Perhaps the most significant of these shifts was the continued loss of population in the City of Detroit and certain inner-suburban areas. Detroit alone lost over 75,000 people. At the same time, the outer suburbs of the Detroit metropolitan area and much of the Northern Lower Peninsula experienced significant growth. As a result of these changes, Michigan's congressional districts for the next decade must change as well. Senate Bill No. 546 establishes new congressional districts for the State of Michigan; and

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Whereas, In 1999, the Legislature enacted statutory criteria to be applied in redistricting Michigan's congressional districts (1999 PA 221). These criteria incorporate the federal constitutional requirement of precise mathematical equality of population in each district. They also require compliance with section 2 of the federal Voting Rights Act. As "secondary" state criteria, 1999 PA 221 requires, in descending order of priority, that congressional districts (1) shall break as few county boundaries as reasonably possible, (2) shall break as few city or township boundaries as reasonably possible, and (3) within a city or township to which there is apportioned more than one congressional district, districts shall be as compact as possible. (The third secondary criterion is inapplicable in the current redistricting cycle because no Michigan city is large enough to encompass more than one congressional seat); and

Whereas, The secondary criteria established for congressional redistricting are similar to the criteria utilized by the Federal District Court when it drew Michigan Congressional districts in 1992 (*Good v Austin*, 800 F Supp 551 (1992)). They are also similar to the so-called "Apol Criteria" utilized by the Michigan Supreme Court for redistricting the Michigan Legislature in 1982 and 1992. The Apol Criteria were enacted into law in 1996 for use in state legislative redistricting. Among other things, they effectuate a long-standing state constitutional policy of preserving county and, to a lesser extent, city and township boundary lines in the redistricting of the state Legislature. While this constitutional policy is not directly applicable to congressional districting, the Legislature nevertheless adopted it as a statutory policy for congressional districts; and

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Whereas, Unlike the Apol Criteria, which require the fewest possible breaks in county and municipal lines, the congressional redistricting criteria require only that district lines break as few county, city, and township boundary lines "as is reasonably possible." The reason for this difference is that federal courts have held that population deviations of up to 10% between state legislative districts to achieve legitimate state goals are presumptively valid. This flexibility — as distinguished from the requirement of precise mathematical equality for congressional districts — better enables the achievement of the fewest possible breaks in a redistricting plan for the Legislature; and

Whereas, Except within cities apportioned more than one congressional seat (and there are currently none), compactness is not a requirement. As the Michigan Supreme Court observed in its 1982 state redistricting decision, compactness is not an end in itself but rather a means of avoiding political gerrymandering (*In Re Apportionment* — 1982, 413 Mich 96, 134 (1982)). Requiring preservation of county, city, and township boundary lines effectively achieves the same anti-gerrymandering purpose. Furthermore, use of counties, cities, and townships as the basic building blocks for districts helps assure reasonable spatial uniformity among districts (*In Re Apportionment* — 1982, 413 Mich 133); and

Whereas, The statutory criteria for congressional redistricting are set forth in MCL § 3.63. They are as follows:

> Except as otherwise required by federal law for congressional districts in this state, the redistricting plan shall be enacted using only these guidelines in the following order of priority:

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(a) The constitutional guideline is that each congressional district shall achieve precise mathematical equality of population in each district.

(b) The federal statutory guidelines in no order of priority are as follows:

(i) Each congressional district shall be entitled to elect a single member.

(ii) Each congressional district shall not violate section 2 of title I of the voting rights act of 1965, public Law 89-110, 42 U.S.C. 1973.

(c) The secondary guidelines in order of priority are as follows:

(i) Each congressional district shall consist of areas of convenient territory contiguous by land. Areas that meet only at points of adjoining corners are not contiguous.

(ii) Congressional district lines shall break as few county boundaries as is reasonably possible.

(iii) If it is necessary to break county lines to achieve equality of population between congressional districts as provided in subdivision (a), the number

of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(iv) Congressional district lines shall break as few city and township boundaries as is reasonably possible.

(v) If it is necessary to break city or township lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.

(vi) Within a city or township to which there is apportioned more than 1 congressional district, district lines shall be drawn to achieve the maximum compactness possible.

(vii) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.

(viii) If a discontiguous township island exists within an incorporated city or discontiguous portions of townships

are split by an incorporated city, the splitting of the township shall not be considered a split if any of the following circumstances exist:

(A) The city must be split to achieve equality of population between congressional districts as provided in subdivision (a) and it is practicable to keep the township together within 1 district.

(B) A township island is contained within a whole city and a split of the city would be required to keep the township intact.

(C) The discontiguous portion of a township cannot be included in the same district with another portion of the same township without creating a noncontiguous district.

(ix) Each congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state.

; and

Appendix C

Whereas, In determining the number of county breaks in a proposed plan, the House and Senate utilized the same methodology that the Supreme Court utilized in redistricting the Legislature in 1982 and 1992. This methodology is set forth in publicly available correspondence between the Supreme Court and its special master for the 1982 plan and in footnote seven of the concurring opinion of Justices Levin and Fitzgerald in the 1982 redistricting case (*In Re Apportionment* — 1982, 413 Mich 96, 155, n.7.) That methodology for determining county breaks is as follows:

> 1. Breaking a county line means assigning part of the population of a county to one or more other counties in the formation of a district.
>
> 2. If population is shifted from a county to a single election district (even if it comes from two geographically-separate whole cities or townships), that counts as one break. However, if population from that county is shifted to two or more election districts, that counts as two or more breaks.
>
> 3. A subsidiary rule (an exception) is that if one part of a county is shifted to one district and all the rest of the county is shifted to another district, that counts as one break.

; and

Whereas, The number of municipal breaks was determined by essentially the same methodology:

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1. Breaking a municipal line means assigning part of the population of a municipality to one or more other municipalities or counties in the formation of a district.

2. If population is shifted from a municipality to a single election district, that counts as one break. However, if population from that municipality is shifted to two or more election districts, that counts as two or more breaks.

3. A subsidiary rule (an exception) is that if one part of a municipality is shifted to one district and all the rest of the municipality is shifted to another district, that counts as one break.

4. If the boundary of a city which is located in more than one county, is broken in order to preserve a county boundary, that does not count as a municipal break.

; and

Whereas, The United States Supreme Court has observed that districting solely to achieve population equality "may be little more than an open invitation to partisan gerrymandering" (*Reynolds v Sims*, 377 US 533, 578 (1969)). The secondary criteria requiring the preservation of political subdivision boundaries to the extent reasonably possible substantially limits discretionary decision-making, and thus limits the opportunities for political gerrymandering; and

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Whereas, Decennial census data became available in Michigan on March 28, 2001. Creation of a redistricting plan requires 2000 Census population data and 2000 Census geography, known as TIGER/Line files. All of this data has been made publicly available by both the Michigan Information Center and the United States Census Bureau from the date it was received by the state. Interested citizens and members of the Legislature have had since that date the opportunity to draft redistricting plans consistent with the statutory criteria; and

Whereas, On June 8, 2001, the Majority Leader of the Senate and the Speaker of the House announced the likelihood that redistricting legislation would be taken up before the summer recess. They asked that proposed plans and comments be submitted to the Secretary of the Senate and the Clerk of the House of Representatives not later than June 18, 2001. On June 20, 2001, that deadline was extended to June 25, 2001; and

Whereas, The Senate Committee on Redistricting held a committee hearing on June 25, 2001. After entertaining public comment, Senate Bill No. 546 was reported favorably with substitute (S-2) to the Senate floor. The Senate thereafter passed Senate Bill No. 546; and

Whereas, Senate Bill No. 546 was referred to the House Committee on Redistricting and Elections. The House Committee on Redistricting and Elections held a committee hearing on July 10, 2001. After entertaining public comment, the Committee reported Senate Bill No. 546 favorably; and

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Whereas, The plan recommended by the House Committee on Redistricting and Elections for the United States House of Representatives consists of 15 single member districts comprised of convenient territories contiguous by land. The population of each district is 662,563; the number of breaks in county boundaries is 11; the number of breaks in city and township lines is 14. This is the plan which is most in compliance with the statutory redistricting criteria, constitutional, and statutory requirements of any plan before the Legislature; and

Whereas, This redistricting plan was designed to comply fully with both section 2 of the Voting Rights Act and the requirements of the Fourteenth Amendment's equal protection clause, as set forth in *Shaw v Reno*, 509 US 630 (1993) and subsequent cases concerning racial gerrymandering. Aware of these dual obligations, this plan avoids any practice or district lines which result in the denial of any racial or ethnic group's equal opportunity to elect a representative of their choice and, at the same time, does not subordinate traditional redistricting principles for the purpose of accomplishing a racial gerrymander or creating a majority-minority district. As a consequence, the plan does not result in retrogression or dilution of minority voting strength, particularly in light of the demographic limitations caused by relative population losses and the neutral criteria set forth in MCL § 3.63. On the other hand, the plan does not sacrifice traditional neutral principles, such as, most importantly, preservation of county and municipal boundaries, for the purpose of engaging in a gerrymander that unnecessarily favors one racial group over others; and

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Whereas, The plan furthers the underlying purpose of the state constitution by facilitating effective representation in the Congress where elected representatives can advance the shared interests of unified municipalities or counties. It does so without sacrificing Voting Rights Act principles, equal electoral opportunities, or racial fairness; now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That we urge the Governor to support and sign Senate Bill No. 546; and be it further

Resolved, That a copy of this resolution be transmitted to the Office of the Governor.

The resolution was referred to the Committee on Redistricting and Elections.

(4)

Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-200

IN THE

Supreme Court of the United States

PAT O'LEAR, DONALD RITTERING, KAY ANN CHASE, STEVE BORRELLO, LAWRENCE KESTENBAUM, JAMES LARKIN, BARBARA LONG, GEORGE GAINES, MINNIE H. WHITING, AND CHRISTOPHER SMITH,

Appellants,

v.

CANDICE S. MILLER, CHRISTOPHER M. THOMAS, THE MICHIGAN REPUBLICAN PARTY, PATRICK MILLER, ANDREW PETTRESS, AND JAMES L. PALASKE,

Appellees.

On Appeal from the United States District Court For the Eastern District of Michigan

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APPELLANTS' BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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APPELLANTS' BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Glaringly absent from both Appellees' motions is any explanation of how even the most egregious partisan gerrymander could ever be invalidated under the District Court's interpretation of *Davis v. Bandemer*, 478 U.S. 109 (1986). By establishing a test that can never be met, the court below has rendered *Bandemer* a dead letter. Gutting *Bandemer* will give partisan redistricters the green light to entrench themselves in power and thwart the will of the majority of the electorate by packing as many politically unfriendly voters into as few districts as possible. Partisan manipulation of district lines in order to dictate electoral outcomes and consign a political party to one-third or less of a State's congressional seats, even if that party consistently wins a majority of the popular vote statewide, violates both the Equal Protection Clause and Article I of the Constitution.

I. This Court Has Jurisdiction Under Section 1253.

Appellees raise three arguments for dismissing this appeal. All three are wrong.

First, the State Appellees argue that this Court lacks jurisdiction under Section 1253 of the Judicial Code because the District Court did not expressly "'grant[] or deny[] . . . an interlocutory or permanent injunction.'" State Mot. 8 (quoting 28 U.S.C. § 1253). That argument is incorrect because the dismissal of a complaint seeking injunctive relief is a "den[ial]" of an injunction within the meaning of Section 1253. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 541 n.5 (1972); *see also* ROBERT L. STERN *ET AL.*, SUPREME COURT PRACTICE § 2.10(b)(1), at 95 (8th ed. 2002). Appellants' complaints asked the District Court to enjoin the

State Appellees from conducting elections under Michigan's 2001 congressional redistricting plan (the "2001 Plan") and to impose a lawful remedial plan. J.S. App. 50a; Intervenors' Mot. App. 27a.[1] The court below dismissed the complaints with prejudice and thus denied all relief sought by the plaintiffs – including injunctive relief. J.S. App. 2a, 19a, 22a. This Court therefore has jurisdiction under Section 1253. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 637-39 (1993) (Section 1253 appeal from a Rule 12 dismissal for failure to state a cognizable constitutional claim); *Baker v. Carr*, 369 U.S. 186, 188, 197-98 (1962) (same).

Second, the Intervening Appellees argue that *Bandemer* applies only to state-legislative redistricting and that partisan-gerrymandering claims against *congressional* districts are nonjusticiable political questions outside this Court's jurisdiction. Intervenors' Mot. 8. This Court's majority opinion in *Bandemer*, however, cited state-legislative and congressional precedents alike, never mentioning any such distinction. *See* 478 U.S. at 118-27. Nor do the Appellees suggest any basis for drawing that distinction. Indeed, the State Appellees concede that nothing in *Bandemer* "supports limiting its equal protection analyses to state legislative redistricting challenges." State Mot. 25.

Third, the Intervening Appellees argue that Appellants lack standing under *Shaw v. Reno* and its progeny. Intervenors' Mot. 8-10. As discussed below, *see infra* pp. 6-

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[1] Appellees' statement that Appellants "nominally" sought injunctive relief and "took no steps in pursuit of that relief," State Mot. 9, is nothing short of bizarre. Permanent injunctions were the centerpiece of the plaintiffs' prayer for relief, and all parties to the lawsuit had engaged in aggressive discovery and were prepared to try the case last May when the District Court abruptly canceled the trial and dismissed the complaint. *See* J.S. 7.

7, this argument rests on a misunderstanding of the relevance of the *Shaw* doctrine to partisan gerrymandering. Moreover, Appellants have standing to challenge the 2001 Plan in its entirety, regardless of the particular districts in which they reside, because partisan-gerrymandering claims are *statewide* claims, not "individual district" claims. *Bandemer*, 478 U.S. at 127, 130, 132-34, 141 (plurality opinion); *see id.* at 146, 153 (O'Connor, J., concurring in the judgment); *id.* at 162, 169 (Powell, J., dissenting in part).[2]

II. Appellees' Construction of *Bandemer* Would Effectively Overrule It.

Appellees attempt to caricature this case as a demand for proportional representation – precisely the kind of claim the *Bandemer* Court rejected. *See* State Mot. 7, 11-12; Intervenors' Mot. 11-16, 25-26. But that is simply a mischaracterization. This case is about *the continued frustration of the will of the majority*, not some minor or transitory deviation from perfect proportionality. To demonstrate the *continued* frustration of majority rule, Appellants alleged and are prepared to prove at trial that the 2001 Plan's partisan skew is likely to be both severe and long-lasting. *See* J.S. 14; J.S. App. 27a, 29a-49a.

Under *Bandemer*, the continued frustration of the majority will is the linchpin to a successful claim of partisan gerrymandering. That is clear not only from the majority's discussion of justiciability but also from the plurality's enunciation of the threshold test for determining unconstitutionally discriminatory effects. As the opinion of the Court explained, both "our general majoritarian ethic and

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[2] In any event, Appellants reside not only in safe Democratic districts (*e.g.*, Districts 5, 13, 14, and 15), but also in safe Republican districts (*e.g.*, Districts 7, 9, 10, 11) and in the one competitive, but Republican-leaning, district (District 1).

the [Constitution's] objective of fair and adequate representation" demand "a level of parity between votes and representation sufficient to ensure that significant minority voices are heard *and that majorities are not consigned to minority status.*" *Bandemer*, 478 U.S. at 126 n.9 (majority opinion) (emphasis added). When plaintiffs belong to a State's most popular political party, "a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters." *Id.* at 133 (plurality opinion); *see also id.* at 135 (asking whether a redistricting plan "would consign the Democrats to a minority status . . . throughout the [decade]").

Appellants' claim clearly meets this test. The 2001 Plan will consign Michigan's Democratic majority to minority status for at least the next decade. Because it frustrates effective majority rule, the 2001 Plan violates *Bandemer*.

A consistent majority of voters prefer Democratic candidates in federal elections in Michigan, where Democrats have won the last three presidential contests, 8 of the last 9 U.S. Senate elections, and a majority of votes cast statewide in 13 of the last 14 U.S. House elections. J.S. 3 & n.1. Under the 2001 Plan, however, this Democratic majority can expect to capture only one-third of the State's congressional seats (5 out of 15). J.S. App. 3a, 44a-47a. In other words, the party that consistently wins the most popular support will have only half as many Representatives as the party that consistently finishes second. Even if Democrats were to increase their statewide victory margin by 10 to 15 percentage points – a shift of historic magnitude – they still would capture well under half the seats (6 out of 15) under the 2001 Plan. *See* J.S. 15; J.S. App. 46a.

This gross disparity results from a classic gerrymander. Hundreds of thousands of Democratic voters

have been "packed" into five overwhelmingly Democratic districts, which presidential candidate Al Gore won by landslide margins ranging from 23 percentage points to a whopping 66 points (83% to 17% in two districts). The remainder of the State's Democratic voters has been evenly spread, or "cracked," among the other ten districts, where they will be stuck permanently in the minority. By contrast, Republican voters have been efficiently spread among those ten districts, in each of which they comprise a majority. Nine of those ten Republican districts are so safe that they are unlikely to generate any truly competitive general elections in the coming decade.[3]

Intervening Appellees are simply incorrect in asserting that this case could alter control of only one or two seats. Intervenors' Mot. 1, 13. Al Gore – who won the statewide vote by roughly five percentage points – carried 8 of 15 districts under the alternative plans supported by Appellants, but only 5 of 15 districts under the 2001 Plan. J.S. App. 44a. If majority rule means anything, a party with consistent majority support in the electorate should get more than 5 of 15 seats. The difference between an 8-to-7 majority and a 5-to-10 minority is hardly insignificant under *Bandemer* – especially when that differential is likely to hold for an entire decade.

The District Court clearly erred by grafting additional requirements onto *Bandemer*. As explained in the Jurisdictional Statement, in actual practice no plaintiff can prove any of the three "indicia" of political powerlessness

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[3] The First District, in northern Michigan, leans Republican but currently has a strong Democratic incumbent. His presence may allow Democrats – the majority party statewide – to win 6 of Michigan's 15 seats. But if he retires from Congress in the next decade, the district will likely swing into the Republican column, generating a 10-to-5 advantage for the State's *minority* party. *See* J.S. App. 3a.

that the District Court proposed as an additional necessary element to a partisan-gerrymandering claim. *See* J.S. 2-3, 8-11, 16-20. Appellees, like the court below, point to shards of dicta from the *Bandemer* plurality opinion to show that these three "indicia" were not pulled out of thin air – a point that no one here contests. *See* State Mot. 13-17; Intervenors' Mot. 12, 15-18. But Appellees do not even attempt to explain how a plaintiff could ever satisfy any of these three tests. Thus, Appellees have not laid a finger on the central argument presented in this appeal: that the court below nullified this Court's decision in *Bandemer* by effectively making it impossible to state a claim of unconstitutional partisan gerrymandering.

III. Appellees Misunderstand the Relevance of the *Shaw* Doctrine to Partisan-Gerrymandering Claims.

Appellees' responses to the second question presented by this appeal demonstrate that they fundamentally misunderstand the relationship between the *Shaw* doctrine and the partisan-gerrymandering claims raised here. *See* State Mot. 18-22; Intervenors' Mot. 19-23. Contrary to Appellees' assertions, Intervenors' Mot. 23, Appellants did not bring a "*Shaw* political gerrymandering claim" against the 2001 Plan. *See* J.S. App. 49a; Intervenors' Mot. App. 25a. Rather, they brought a *Bandemer* claim and argued that *Shaw* and its progeny illuminate how partisan a redistricting plan must be before it violates the Equal Protection Clause. *See* J.S. 21-24.

To be sure, the legal standards for judging partisan and racial gerrymandering need not be identical. *See Shaw*, 509 U.S. at 650. But pulling them into closer alignment would bring some refreshing candor to a field of litigation that has suffered from a shortage of it. All too often, what are in reality partisan battles get fought out in the courts

under the guise of racial controversies, using either the *Shaw* doctrine or the Voting Rights Act. Bringing the standards for partisan and racial gerrymandering closer together will reduce the incentives for racially inflammatory gamesmanship in the service of partisan goals.

Considerations of race, or of political viewpoint, can be *a* factor in redistricting but cannot be *the* overriding factor. Under the *Shaw* doctrine, district courts distinguish between primary and secondary motivations of redistricting bodies: a redistricting plan is presumptively unconstitutional if race was the *predominant* motivating factor and traditional districting principles were subordinated to that predominant factor. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). Here, Appellants' point is that, if the Constitution bars a districting plan that is "'unexplainable on grounds other than race,'" *Shaw*, 509 U.S. at 644 (citation omitted), a plan that is unexplainable on grounds other than political viewpoint also should be constitutionally suspect because this Court's First Amendment political-patronage decisions prohibit States from classifying or discriminating against citizens on the basis of their partisan affiliation. *See* J.S. 22 (citing cases).

The 2001 Plan, which jettisoned the traditional districting criteria that the Michigan Legislature enacted in 1999 and reenacted in 2001, is unexplainable on grounds other than rank partisanship.[4] The Court should make clear that such a map goes too far.

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[4] Contrary to Appellees' suggestions, *see* State Mot. 3-4 & n.4; Intervenors' Mot. 5, the Michigan Supreme Court did *not* hold that the Legislature failed to reenact the 1999 criteria in 2001 or that the 2001 Plan satisfied those criteria; it merely held that the twice-enacted criteria were nonbinding and unenforceable. *See* J.S. 6 (citing *LeRoux v. Secretary of State*, 640 N.W.2d 849, 860-64 (Mich. 2002)). Similarly, Appellees incorrectly assert that the court did not divide along partisan

IV. Appellees Have Failed to Refute the Claim that Enactment of the 2001 Plan Violated Article I of the Constitution.

As for the third question presented in this appeal, Appellees do not even try to defend the District Court's holding that Article I's Elections Clause "has no role to play" in congressional redistricting. J.S. App. 15a. That holding is simply wrong. J.S. 10, 25; Intervenors' Mot. 24.

Instead, Appellees argue that the Elections Clause cases that Appellants rely on – *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-35 (1995), and *Cook v. Gralike*, 531 U.S. 510, 522-26 (2001) – "have nothing to do with redistricting or with claims of vote dilution." Intervenors' Mot. 24; *see* State Mot. 25. They even contend that no aspect of the 2001 Plan is "remotely equivalent" to the law struck down in *Cook v. Gralike*, which "'handicap[ped] those who [sought] federal office by affixing pejorative labels next to their names on the ballot if they [did] not pledge to support the State's preferred position on a certain issue.'" Intervenors' Mot. 24 n.13 (citation omitted). But the analogy between *Cook* and this case can hardly be

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lines; in fact, all five Justices nominated by the Republican Party, but neither of the two Justices nominated by the Democratic Party, joined the majority opinion in *LeRoux*. *See* J.S. 7.

Indeed, virtually all of Appellees' charges of "mischaracterizations of the facts [and] blatantly erroneous statements," State Mot. 2 n.1, are themselves inaccurate. For example, the statistical and expert analyses cited in the Jurisdictional Statement are pulled directly from the complaint and the District Court's opinion, *see* J.S. 4 (citing J.S. App. 3a, 27a, 43a-47a) – hardly improper sources when reviewing a Rule 12 dismissal. And it should be beyond dispute that the bill passed by the Legislature on July 11 "differed" from that signed by the Governor on the afternoon of September 11, 2001. *See* J.S. 6-7; State Mot. 3; Intervenors' Mot. 3-4. Finally, it is undisputed that the 2001 Plan broke more county and municipal boundaries than did at least one of Appellants' alternative plans. *See* J.S. 5-6, 23-24.

missed: Under the 2001 Plan, even though most Michigan voters prefer Democratic candidates for federal office, at least nine of Michigan's fifteen Democratic congressional nominees will be forced to run on a ballot where being labeled as a Democrat is tantamount to certain defeat. *See* J.S. 12. That handicap was imposed on those candidates (and thus on the hundreds of thousands of Democratic voters they wish to represent) because they did not pledge to support the State's preferred position on the central issue in congressional politics today: which political party should control Congress.

Redistricting plans enacted to foster fairness and competition in congressional elections are clearly authorized by the Elections Clause. But Michigan's 2001 Plan goes far beyond evenhanded procedural regulation and instead effectively dictates electoral outcomes and severely handicaps one class of candidates. As Justice Kennedy has explained, the Elections Clause does not permit a State "to interpose itself between the people and their National Government as it seeks to do here." *Cook*, 531 U.S. at 527 (Kennedy, J., concurring). Michigan's technique may be subtler, but the end result is really no different from that in *Cook v. Gralike* – the undermining of the democratic electoral process.[5]

Finally, the State Appellees contend that the Framers' acceptance of at-large, rather than district-based, congressional elections shows that they were unconcerned with partisan gerrymandering. State Mot. 22-23. But that fact only serves to underscore Appellants' argument that this case is about majoritarian principles, not proportional

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[5] Both sets of Appellees are simply wrong in stating that voters or candidates cannot challenge state legislation as violating the Elections Clause. *See* Intervenors' Mot. 24; *see also* State Mot. 23-25. That is precisely what plaintiff Gralike did successfully in *Cook*.

representation. *Cf. supra* pp. 3-6. Having only recently wrested control from the English monarchy, the Framers were most concerned about preserving democratic majority rule. *See* J.S. 26-28; *cf. Bandemer*, 478 U.S. at 126 n.9 (citing the Constitution's "majoritarian ethic"). They fully understood that at-large elections can yield dramatically supra-proportional representation for the *majority* party, as 100% of the seats may be awarded to the party with 51% support in the statewide electorate. But unlike the 2001 Plan at issue here, at-large elections cannot hand a supermajority of seats to the *minority* party and ensure that the result holds for the next decade. Only partisan gerrymandering can do that. And as Professor McConnell has explained, partisan gerrymanders that systematically thwart majority rule and deliver effective control to a minority faction are "in obvious tension with the [Framers'] values of Republicanism." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116 (2000).[6]

CONCLUSION

The Court should note probable jurisdiction.

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[6] Appellees assert that Appellants' interpretation of the Elections Clause would require state legislatures to seek "absolute [political] neutrality," State Mot. at 24, to "be blind to politics in congressional redistricting," Intervenors' Mot. at 25, and to refrain from creating *any* "safe seats," *id.* at 26-27. Appellants have suggested no such thing. *See* J.S. 24 (arguing only that "the Elections Clause does not give state legislatures the power to rig congressional elections [through strategic line-drawing] and thereby thwart effective majority rule"); *see also id.* 14-15 (acknowledging that our winner-take-all political system does, and should, tend to generate supra-proportional representation for the party that earns *majority* support in the electorate).

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